Bulletin 101 Law Serial 5

DEPARTMENT OF THE INTERIOR
BUREAU OF MINES
JOSEPH A. HOLMES, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS
ON
MINES AND MINING

OCTOBER, 1914, TO APRIL, 1915

BY

J. W. THOMPSON

WASHINGTON
GOVERNMENT PRINTING OFFICE
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PREFACE.

This bulletin is the fourth of its kind to be published by the Bureau of Mines, the three preceding being Bulletin 61, Bulletin 79, and Bulletin 90.

The wide demand for the information contained in these bulletins has led the bureau to decide to issue similar bulletins with sufficient frequency to keep resaonably current the records of decisions of Federal and State courts of last resort on questions relating to the mineral industry.

The bureau will gladly welcome and consider any suggestions looking to improvement in the matter contained in these bulletins or the manner in which it is presented. The purpose of the bulletins will continue to be to improve directly or indirectly mining conditions and to promote the health and safety of miners by the prompt publication of decisions, and to this end it is desired that the bulletins reach all persons who are interested.

J. A. Holmes.

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A complaint in an action to quiet title to minerals and to the mineral rights in certain land is insufficient in the absence of a direct allegation of possession, although it avers that the plaintiff from the time of receiving the conveyance assessed the mineral interest for taxes each year and paid the taxes thereon and exercised various acts of ownership of such mineral interests, in that he caused test pits to be dug on the land for the purpose of exploring the minerals and ascertaining their quality and extent, in going upon the land and looking after them from time to time, and that he accompanied or caused his agents to accompany prospective purchasers of such mineral interests and exhibited the same to such prospective purchasers in efforts to sell them.

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Kentucky River Consolidated Coal Co. *v.* Frazier (Kentucky), 170 Southwestern, 986, p. 988, December, 1914.

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McBeth *v.* Wetnight (Indiana), 106 Northeastern, 407, p. 410, October, 1914.

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A deed conveying lands and excepting therefrom all coal or other minerals or mineral waters, sufficiently manifests an intent to except the minerals in the land from the operation of the deed and such a reservation of a proper subject matter of an exception is in law an exception though incapable of operation as a reservation, since it expresses an unequivocal intent not to part with the thing reserved.

Freudenberger Oil Co. *v.* Simmons (West Virginia), 83 Southeastern, 995, p. 988, December, 1914.

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Himrod *v.* Fort Pitt Mining & Milling Co., 220 Fed., 80, p. 82, January, 1915.

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A grant by a landowner of the underlying minerals implies the right to construct and operate roads and tram and railway tracks upon the surface for the use of the mine, to build air shafts, erect machinery, store water for the use of engine, and in general to do that which is reasonably necessary for the use of the thing granted; and it is not requisite to an implied grant that there be absolute physical necessity for the right demanded.

Himrod *v.* Fort Pitt Mining & Milling Co., 220 Fed., 80, p. 82, January, 1915.

SEVERANCE—EFFECT OF ADVERSE POSSESSION.

Where there has been a severance by deed of the surface of land from the underlying mineral the possession of the surface for more than 20 years does not carry with it the possession of such minerals

beneath the surface; and where such surface owner seeks to establish title to the underlying minerals by adverse possession as against one holding the legal title to such minerals he must prove possession of the minerals as such independent of his surface possession.

McBeth *v.* Wetnight (Indiana), 106 Northeastern, 417, p. 410, October, 1914.

TITLE TO MINERALS—ADVERSE POSSESSION.

Where there has been an actual valid severance by deed or by adverse possession of the title to the surface and the title to the minerals underneath, a mere cessation of the working or operation of a mine on the land by the owner thereof, or mere nonusage of the mineral, will not deprive the owner of the mineral of his right thereto or his possession thereof. To effect this there must be more than an abandonment or nonusage by the owner of the particular mine, and the proof must show an abandonment or disseizin of his possession of the mineral right, before the owner of the surface can ripen a title to such underlying minerals by adverse possession.

McBeth *v.* Wetnight (Indiana), 106 Northeastern, 407, p. 411, October, 1914.

TITLE—ADVERSE POSSESSION OF MINERALS.

It is essential in order to effect adverse possession of minerals, after severance in title from the surface, that the adverse claimant do some act or acts evincing a permanency of occupation and use, as distinguished from acts merely occasional, desultory, or temporary acts, that are suitable to the enjoyment and appropriation of the minerals so claimed, and hostile to the rights of the owner; but the mere possession of the surface after such severance does not give title to the minerals.

Birmingham Fuel Co. *v.* Boshell (Alabama), 67 Southern, 403, p. 404, December, 1914.

ADVERSE POSSESSION OF SURFACE—EFFECT OF MINERALS.

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Birmingham Fuel Co. *v.* Boshell (Alabama), 67 Southern, 403, p. 404, December, 1914.

TITLE TO MINERALS NOT LOST BY NONUSAGE.

A person in the possession of the surface land is presumed to have possession of the subsoil also; but when by conveyance or reservation a separation has been made of the ownership of the surface from that

of the minerals below the surface, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right of possession by any length of nonusage; but to lose his right he must be disseized, and there can be no disseizin by an act which does not actually take the minerals out of his possession.

Shrewsbury *v.* Pocahontas Coal & Coke Co., 219 Fed., 142, p. 147.

POSSESSION OF SURFACE—EFFECT ON UNSEVERED MINERALS.

Possession under a general warranty deed of a tract of land described therein is the possession of all the elements of the land and of everything underneath the surface, unless the mineral products have therefore been separated from the ownership of the surface by a previous conveyance.

Big Sandy Coal Co. *v.* Ramey (Kentucky), 172 Southwestern, 508, p. 510, January, 1915.

MINERAL AND AGRICULTURAL LANDS.

The act of August 30, 1890 (26 Stat., 391), limited the amount of land to be acquired by any one person to 320 acres in the aggregate; and the subsequent act of March 3, 1891 (26 Stat., 1095, p. 1101), expressly limited the maximum amount of 320 acres that could be acquired by any one person to agricultural lands, and has no application to lands entered or sought to be entered under mineral lands laws.

Shenk *v.* Aumiller, 217 Fed., 969, p. 972.

GRANT OF TUNNEL RIGHT—IMPLIED RIGHT TO DEPOSIT TUNNEL WASTE ON SURFACE.

There are obvious degrees of necessity for the use of the surface in the conduct of subterranean operations, from the absolute necessity of sinking shafts or making other entrances to the mineral, to the practical necessities of business operations, such as the placing of steam engines and machinery at the mouth of the entrances, or constructing ponds of water to supply the engines, of laying and operating railways or tramways to bring in supplies and to carry out the ore, of storage of minerals on the surface pending sale, of assembling houses, stores, and shops for the use of miners, and such uses are implied in the grant if necessary to the operation of the property; and under this rule a grant of a right to bore or construct a tunnel may imply the right, as a reasonanle necessity, to use the surface for the deposit of waste and débris, brought from the tunnel or shaft; but such necessity is to be determined as a question of fact from the circumstances of each particular case.

Himrod *v.* Fort Pitt Mining & Milling Co., 220 Fed., 80, p. 83, January, 1915.

RIGHT TO DEPOSIT TUNNEL REFUSE ON SURFACE—QUESTION OF FACT.

Under a grant of a right to construct a tunnel for mining purposes, where the mouth of the tunnel was located at an elevation of some 10,000 feet above the sea level and upon a steep mountain side, and where it appeared that the owner of the surface, the grantor of the tunnel right, had long used the surface as a place of deposit for similar refuse brought from his own mine and from his portion of the same tunnel, the question of the reasonable necessity of the right of the tunnel grantee to deposit the tunnel refuse and débris on the surface is a question of fact and not of law.

Himrod *v.* Fort Pitt Mining & Milling Co., 220 Fed., 80, p. 84, January, 1915.

COAL AND COAL LANDS.

FRAUDULENT ACQUISITION UNDER HOMESTEAD LAWS.

The fact that lands are located in a well-known coal region and generally reputed to be coal lands, and where an extensive and expensive tunnel, slope, and other openings upon the lands had disclosed that they contained coal of such quality and quantity as to render them valuable for coal mining, and where a prospective purchaser from the patentee caused the lands to be examined by an engineer, who found and reported the tunnel and other openings disclosing the coal, is sufficient, as persuasive evidence at least, to charge such purchaser with notice or knowledge of the fraud of the patentee in obtaining coal lands under homestead law.

Washington Securities Co. *v.* United States, 234 U. S., 76, p. 78.

OPTION TO PURCHASE—CONSTRUCTION.

The owner of certain described coal lands gave to another an option to purchase such land, reserving to himself 5 acres of the surface and describing such 5 acres as the part thereof which had been in cultivation and extended back from the river front in such form as to include buildings, and stipulating that the boundaries of the 5-acre tract were to be definitely located within 60 days from the date of the instrument; but the failure of the owner to fix the boundaries of the 5-acre tract within the 60 days did not amount to a conveyance or an abandonment thereof to the optionee, as such an option is not like an exception from a deed which would be construed to convey the whole land regardless of the attempted reservation, though the condition was fully complied with as against the rights of the optionee, where the boundaries of the 5-acre tract were definitely fixed before the time the optionee was entitled to a deed under the option contract.

Rouse *v.* Riverton Coal & Development Co. (Oregon), 142 Pacific, 343, p. 344.

AGREEMENT RELATING TO COAL IN PLACE.

A contract regarding coal in place may be a sale absolute, a conditional sale, a lease in the ordinary acceptation of that term, or a mere license to mine or remove the mineral.

Gerard Trust Co. *v.* Delaware & Hudson Co. (Pennsylvania), 92 Atlantic, 129, p. 130, July, 1914.

CONTRACT FOR COAL LANDS—SPECIFIC PERFORMANCE.

Specific performance of an agreement by which an owner of the surface and other rights of coal lands agreed to deed the surface and such rights to a corporation to be formed and of which the grantor should be one of the corporators can not be defeated by proof of alleged representations as to the dividends the corporation would probably declare, the profits that would be derived from the business, as these are mere matters of opinion and the failure of such expectations to be realized in a speculative venture is no reason for refusing specific performance where the other party has furnished the capital and performed all the conditions of the contract on his part.

Bartley *v.* Big Branch Coal Co. (Kentucky), 169 Southwestern, 601, p. 602, October, 1914.

TITLE TO COAL—ADVERSE POSSESSION.

Subsequent to a severance by deed of the surface and underlying coal, the grantees under a deed sufficient to give color of title to the entire real estate, took actual possession thereunder of the real estate and of a mine being operated thereon, such possession while it continued extended to the coal under the entire tract conveyed as well as to the surface, and if continued for the required period would have developed into an absolute title to all the coal under the tract conveyed; but the subsequent abandonment of the mine broke the continuity of possession and thereby defeated the title to the coal by adverse possession as against the person holding the legal title of the coal under a former conveyance.

McBeth *v.* Wetnight (Indiana), 106 Northeastern, 407, p. 410, October, 1914.

SURFACE OWNERSHIP NOT ADVERSE TO MINERAL RIGHTS.

The possession of the surface owner of land is not adverse to the title of the owner of coal and minerals beneath the surface; but such surface possession may inure to the benefit of the owner of the underground mineral.

Shrewsbury *v.* Pocahontas Coal & Coke Co., 219 Fed., 142, p. 147.

SEVERANCE OF OWNERSHIP—RESERVATIONS IN DEED.

A deed describing land as containing 25 acres, more or less, the surface only, with the coal and mineral excepted, and with such exceptions as have heretofore been conveyed away, plainly imports a previous conveyance of the coal and minerals in the land and shows a complete severance of the surface and minerals.

Shrewsbury *v.* Pocahontas Coal & Coke Co., 219 Fed., 142, p. 146.

LIFE ESTATE IN SURFACE—EFFECT ON COAL.

A deed, by which the grantor purported to convey a designated tract describing the same by metes and bounds without making any reference to the coal thereunder, where the grantor at the time of the conveyance held under a deed conveying to her a life estate only in the surface, and there had been no determination as to the extent of her interest in the coal, conveys a life estate only and does not pass to the grantee any interest in the coal under the land described.

Dotson *v.* Norman (Kentucky), 169 Southwestern, 527, p. 530, September, 1914.

RESTRICTION AGAINST ALIENATION OF COAL.

Under a deed by which a father conveyed to his son certain coal lands in consideration that the grantee keep and maintain the grantor and his wife during their natural lives, and containing a provision that the second parties shall not sell or convey said land during the lifetime of the grantor without his consent, the grantees can not, during the lifetime of the grantor and without his consent, sell and convey the coal underlying the said tract of land, as such restriction applies as much to the underlying coal as to the surface itself.

Pond Creek Coal Co. *v.* Runyon (Kentucky), 170 Southwestern, 501, p. 503, November, 1914.
Kentucky River Consolidated Coal Co. *v.* Frazier (Kentucky), 170 Southwestern, 986, p. 987, December, 1914.

CONVEYANCE OF COAL IN VIOLATION OF RESTRICTIONS—TITLE.

A purchaser of coal underlying a certain tract of land is not an innocent purchaser for value where the deed to his grantor expressly provided that such grantor should not sell the underlying coal within the lifetime and without the consent of such original grantor, and the mere delay of the original grantor to assert the invalidity of the conveyance of the coal by his grantee will not defeat his right where the grantee of the coal received no title to the coal because the conveyance was in violation of the provisions of the original conveyance.

Pond Creek Coal Co. *v.* Runyon (Kentucky), 170 Southwestern, 501, p. 503, November, 1914.

MINERAL CHARACTER DETERMINED BY LAND DEPARTMENT.

An investigation and determination by the Land Department of the mineral character of land on an application for entry of land under the timber and stone act is conclusive, and a patent issued thereon will not be vacated or canceled on the ground of fraud on proof of the subsequent discovery of coal.

United States *v.* Primrose Coal Co., 216 Fed., 553, p. 557.

FRAUDULENT RESERVATION OF MINERALS—RIGHTS OF CREDITORS.

The fact that a corporation sold a large tract of land to an ignorant negro and fraudulently reserved to itself in the deed of conveyance the coal and oil underlying the land does not authorize or justify a creditor of the grantor, who subsequently recovered a judgment against the grantor corporation, levying upon and selling the estate in the coal and oil so fraudulently received, though there has been no reformation of the deed, where the creditor of the grantor had no lien upon the land and credit was not extended to him on the faith of the reservation in the deed and where it does not appear whether the debt was created before or after the execution of the deed.

Hyden *v.* Calames (Kentucky), 171 Southwestern, 186, p. 187, December, 1914.

POWER OF COURT TO SELL COAL ESTATE OF INFANT.

Under the statute of Kentucky a court may order the sale of any interest in land owned by an infant, whether legal, equitable, vested, or contingent, and under this statute a court may order the sale of coal under the land of an infant without selling the surface; but a court is not justified in ordering the sale of the mineral rights of an infant and giving the purchaser such rights in the surface as to destroy the value of the remaining estate, and where the purchaser would acquire such rights in the surface as would make it impossible for the owner to sell the surface except at a great sacrifice.

Hays *v.* Wicker (Kentucky), 171 Southwestern, 447, p. 448, December, 1914.

STONE LANDS.

EFFECT OF SUBSEQUENT DISCOVERY OF COAL.

The timber and stone act (20 Stat., 89) requires that when any valuable deposit of gold, silver, cinnabar, copper, or coal are known to exist on the land sought to be entered under such act, the entryman is only required to state such fact "as deponent verily believes," and a patent issued thereon will not be vacated on proof of subsequent discovery of coal where before the patent was issued an inves-

tigation was had as to the mineral character of the land and a special agent was sent to personally examine the land and after such examination reported that it was chiefly valuable for timber and stone.

United States *v.* Primrose Coal Co., 216 Fed., 553, p. 557.

OIL AND OIL LANDS—SALE AND CONVEYANCE.

WITHDRAWAL ORDER VALID AS AGAINST SUBSEQUENT OIL LOCATIONS.

The withdrawal order of the President of September 27, 1909, known as the "Temporary petroleum withdrawal No. 5," by which an area aggregating over 3,000,000 acres in California and Wyoming, containing petroleum deposits, was withdrawn from acquisition under the mining laws, is valid and binding as against subsequent oil locations.

United States *v.* Midwest Oil Co., 236 U. S., —, February 23, 1915.

TITLE—EFFECT OF WITHDRAWAL ORDER.

The withdrawal order of September 27, 1909, was ineffective as against a completed oil location and upon which the locator had expended a large sum of money and had discovered oil before the passage of the act of June 25, 1910 (36 Stat., 847).

United States *v.* McCutchen, 217 Fed., 650, p. 655.

OIL LOCATIONS—EFFECT OF SUBSEQUENT LOCATIONS.

Subsequent oil locations made for the purpose of protecting and strengthening the original location can not be regarded as fraudulent, though made in whole or in part by persons who had no intention of claiming the land or any interest in it for themselves.

United States *v.* McCutchen, 217 Fed., 650, p. 654.

POSSESSOR'S RIGHT TO OIL AND GAS.

Under the Louisiana Civil Code the right of a possessor in good faith to the benefit of the fruits of the land until it is claimed by its owner does not permit such possessor to extract the mineral, oil, and gas from the land and retain the proceeds; and the word "products" as used in the code is synonymous with fruits.

Elder *v.* Ellerbe (Louisiana), 135 Louisiana, —, 66 Southern, 337, November, 1914.

TERMINATION OF ESTATE.

A conveyance by deed of the oil and gas in and under a certain tract of land, in consideration of the payment of a certain stated sum, and upon condition for the payment to the grantor of another stated sum or reconveyance to him of the oil and gas within 90 days after

the completion of a well on the premises, or payment of another stated sum within two years from the date of the deed and payment of a stipulated purchase price or reconveyance after the completion of the well, but subsequent to the expiration of such two-year period, is conditional also upon the completion of such well within two years after the expiration of the two-year period expressly provided in the deed; and the estate granted ipso facto ceased on the expiration of four years without completion of a well, even though the last stated payment was made as contemplated.

Philadelphia Co., etc., *v.* Underwood (West Virginia), 83 Southeastern, 905, December, 1914.

PIPE LINE ACT—CONSTITUTIONALITY.

The Hepburn Act, regulating pipe lines, deals with commerce among the various States, and the fact that oils transported belong to the owner of the pipe line is not conclusive against the transportation being such commerce.

Pipe Line Cases, In re, 234 U. S., 548, p. 560.

PIPE LINE—OPERATION FOR PRIVATE USE.

When an oil company is simply drawing oil from its own wells across a State line to its own refinery for its own use and nothing more, it does not fall within the description of the Hepburn Act regulating pipe lines, the transportation in such case being merely an incident to its use at the end.

Pipe-Line Cases, In re, 234 U. S., 548, p. 561.

PIPE LINES—STATUTORY REGULATIONS.

The Hepburn Act was intended to reach the combination of pipe lines by which the Standard Oil Co. owned and controlled either all or a large part of the stock of the New York Transit Co., the National Transit Co., and the Ohio Oil Co., and the National Transit Co., which in turn owned nearly all the stock of the Prairie Oil & Gas Co.; but the provisions of the act are to apply to any persons engaged in the transportation of oil by means of pipe lines; and the words "who shall be considered and held to be common carriers within the meaning and purpose of this act" are not intended to cut down the generality of the previous declaration and mean that only those shall be held common carriers under the act who were common carriers in a technical sense; and while the act does not compel them to continue in operation, it does require them not to continue except as common carriers. The purpose of the act was to bring within its scope pipe lines that, although not technically common carriers, yet were carriers of oils offered, if only the offerers would sell at their price.

Pipe-Line Cases, In re, 234 U. S., 548, p. 559.

EMINENT DOMAIN.

APPROPRIATION OF LAND—TITLE TO MINERALS.

Eminent domain being an attribute of sovereignty unlimited by the Constitution, the State may, through its legislature, in the exercise of its high prerogative, authorize a public-service corporation to take any estate in land dictated by its sovereign will; and under the express terms of the statute of West Virginia a railroad company, by condemnation and compliance with all the provisions of the law, takes an estate in fee simple absolute in the land taken, including the oil and gas and other minerals in and under the same.

Hays *v.* Walnut Creek Oil Co. (West Virginia), 83 Southeastern, 900, p. 901, December, 1914.

PRIVATE PROPERTY—PRIVATE WAYS OF NECESSITY.

The constitution of Arizona provides that private property shall not be taken for private use except for private ways of necessity, or for drains or flumes on or across the lands of others for mining and other stated purposes; but the legislature has given no definition for the term "private ways of necessity" and the courts can not, in the absence of such a definition by the lawmaking body, define what shall constitute private ways of necessity, and accordingly a court can not say that a tunnel extended from one group of mining claims to another through an intervening mining claim privately owned, is a "private way of necessity," that may be appropriated for mining purposes.

Inspiration Consolidated Copper Co. *v.* New Keystone Copper Co. (Arizona), 144 Pac., 277, p. 279, November, 1914.

APPROPRIATION OF PRIVATE PROPERTY FOR MINING PURPOSES.

The constitution of Arizona authorizes the legislature to enact legislation providing for the condemnation of private property for private use, to wit, private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining purposes, and the private use for which property may be appropriated need not in any sense be a public use.

Inspiration Consolidated Copper Co. *v.* New Keystone Copper Co. (Arizona), 144 Pac., 277, p. 279, November, 1914.

APPROPRIATION OF RIGHT OF WAY—DAMAGES.

In appropriation proceedings by a railroad company for land for a right of way it is not proper in estimating damages to take into consideration a large tract of coal land not contiguous to the tract or tracts, parts of which were taken for the right of way.

Buchannon & Northern Railroad Co. *v.* Great Scott Coal & Coke Co. (West Virginia), 83 Southeastern, 1031, p. 1035, December, 1915.

DAMAGES FOR APPROPRIATION OF LAND—BURDEN OF PROOF.

In proceedings for the appropriation of the surface of coal lands for a right of way for a railroad, the owner of the land is entitled to the value of the land taken at the time of taking and to damages to the residue, deducting special but not general benefits, and in neither case has the owner the burden of showing general benefits; but the burden is upon the landowner to prove the value of the land taken and the damages to the residue, while the burden is upon the railroad company to prove special benefits in order to lessen the damages.

Buchannon & Northern Railroad Co. *v.* Great Scott Coal & Coke Co. (West Virginia), 83 Southeastern, 1031, p. 1038, December, 1915.

APPROPRIATION OF LAND FOR HIGHWAY—RIGHT TO SECOND WAY.

The statute of Iowa provides that any person or corporation owning or leasing any lands not having a public or private way thereto may have a public way to any railway station, street, or highway established over the land of another; and provides also that any owner, lessee, or possessor of lands having coal or other minerals thereon, who has paid the damages assessed for roads established as provided, may construct, use and maintain a railway thereon for the purpose of reaching and operating any mine on such land and of transporting the products thereof to market; and this gives the person or corporation named his choice as between a highway and the railway connection and no limitation is put upon his use of such way as he may acquire and he may use it as a wagon way or railway, or both; but having acquired the one or the other he can not condemn for outlet purposes; and accordingly a coal company having a private way from its coal mine and lands to a public highway, is not entitled to condemn a right of way for a railroad switch in addition to its private way.

Fisher *v.* Maple Rock Coal Co. (Iowa), 151 Northwestern, 823, p. 824, March, 1915.

MINING TERMS.

APPLIANCES.

Motor trucks in the main haulageway of a coal mine constitute an appliance for the removal of coal.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 942, April, 1915.

APPLIANCES OF TRANSPORTATION.

Appliances of transportation as applied to a coal mine include the motor tracks, roadbed, cars, and motors used for the removal of coal from the mine.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 942, April, 1915.

BLOCKHOLER.

A blockholer in a mine is a person whose duty it is to break up and reduce to safe and convenient size, by blasting or otherwise, any large blocks or pieces of rock that have been blown down by the miners; and in the prosecution of the work his duty is to go from one level of a mine to another in the territory assigned to him, following up the work of the miners, looking for and breaking up such pieces, and in connection with that work starting them, as well as other large pieces, which can be moved without breaking, down the incline to where the trammers can conveniently handle them, and at times when these duties are performed he also passes down dirt and works the material toward the place of loading the cars to facilitate the work of the trammers.

Mesich *v.* Tamarack Mining Co. (Michigan), 151 Northwestern, 564, p. 563, March, 1915.

CAP.

A "cap" is a square piece of plank or block wedged between the top of posts and the roof of a mine the better to hold the roof.

Big Branch Coal Co. *v.* Wrenchie (Kentucky), 170 Southwestern, 14, p. 16, November, 1914.

CUT.

The word "cut" may have a meaning other than that employed in mining, but when it is used in conjunction with "shaft" and "drift" it means a surface opening in the ground intersecting a vein, and is never intended to apply to a ditch or trench temporarily open for the purpose of laying sewer pipe.

McLaughlin *v.* Bardsen (Montana), 145 Pacific, 956, January, 1915.

"DEAD MAN."

A "dead man" in a mine is a wooden block used to guard the mouth of a mine against runaway cars.

Connors Weyman Steel Co. *v.* Kilgore (Alabama), 66 Southern, 609, p. 612, November, 1914.

GASOLINE.

Gasoline is a colorless, inflammable fluid, the first and highest distillant of crude petroleum, representing the lightest portions of crude oil, is extracted from it by distillation; and being the most volatile component of petroleum, it readily separates from it and in the process of distillation is the oil drawn off at the lowest temperature.

Locke *v.* Russell (West Virginia), 84 Southeastern, 948, p. 950, April, 1915.

GAS WELL.

The words "gas well" used in an oil and gas lease mean a well having such a pressure and volume of gas, taking into account its proximity to market, as could be operated profitably and the gas utilized or disposed of commercially.

Prichard *v.* Freeland Oil Co. (West Virginia), 84 Southeastern, 945, p. 946, April, 1915.

HEADER.

Headers are pieces of plank—longer than a cap—extending over more of the roof and supported by two props, one at each end.

Big Branch Coal Co. *v.* Wrenchie (Kentucky), 170 Southwestern, 14, p. 16, November, 1914.

MINE—COAL MINE

The terms "mine" and "coal mine" are intended to signify any and all parts of the property of a mining plant, either on the surface or underground, that contribute directly or indirectly under one management to the mining or handling of coal.

Hakanson *v.* La Salle County Carbon Coal Co. (Illinois), 106 Northeastern, 617, p. 618, October, 1914.

PILLARS OR STUMPS.

Pillars or stumps in a coal mine are the natural supports left in the mine for the purpose of supporting the roof.

Northeast Coal Co. *v.* Hunley (Kentucky), 174 Southwestern, 732, March, 1915.

PROP.

By "prop" is meant an upright post surmounted by a square block wedged between the top of the post and the roof.

Big Branch Coal Co. *v.* Wrenchie (Kentucky), 170 Southwestern, 14, p. 16, November, 1914.
Eagle Coal Co. *v.* Patrick (Kentucky), 170, Southwestern, 960, p. 961, December, 1914.

PUSHER—JIGGER BOSS.

"Pusher" or "jigger boss" is a term used in mining parlance to designate one who is engaged for the purpose of encouraging or hastening the miners.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 908, December, 1914.

SHAFT.

The term "shaft" as used in the Illinois mines and miners act means any vertical opening through the strata which is or may be used for the purpose of ventilation, escapement, or for the hoisting or lowering of men and material in connection with mining coal.

Hakanson *v.* La Salle County Carbon Coal Co. (Illinois), 106 Northeastern, 617, p. 618, October, 1914.

STOPE.

A stope in a mine is an excavation made in removing the ore which has been opened up or made accessible by shafts and drifts or levels.

Mesich *v.* Tamarack Mining Co. (Michigan), 151 Northwestern, 564, p. 565, March, 1915.

STRIKE.

Shutting down a mine by calling out men in obedience to their obligation as members of the United Mine Workers of America is what is known as a "strike."

Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed., 685, p. 705.

TIMBERING.

By "timbering" is meant the protecting against falls of roof formation of a mine, by means of horizontal timbers or caps extending across the passageway just under the roof, the ends of such timbers resting upon vertical timbers or posts.

Eagle Coal Co. *v.* Patrick (Kentucky), 170 Southwestern, 960, p. 961, December, 1914.

TRAMMER.

Trammers in a mine are common laborers, who, working chiefly with shovels, load the ore and dirt or rock into tram cars and push them out from the stope to where they are attached to cars which haul them to the shaft; and in loading the cars they also at times, when conditions require, go up or back into the stope and pass dirt toward the cars.

Mesich *v.* Tamarack Mining Co. (Michigan), 151 Northwestern, 564, p. 565, March, 1915.
See Zap *v.* Newport Mining Co. (Michigan), 151 Northwestern, 554, March, 1915.
Sabela *v.* Newport Mining Co. (Michigan), 151 Northwestern, 598, March, 1915.

MINING CORPORATIONS.

CORPORATE POWERS—SURRENDER OF COAL LEASE.

An express surrender of a coal lease by a mining corporation requires corporate action; and the president of such a corporation has no inherent power to surrender a mining lease belonging to the corporation.

Laing *v.* Price (West Virginia), 83 Southeastern, 497, p. 499, October, 1914.

POWER OF DIRECTORS TO DISPOSE OF PROPERTY.

The general incorporation act of Delaware (22 Delaware Laws, 394), authorizing a mining corporation to buy, sell, and deal in mines, acquired by exchange of property, and sell or otherwise dispose of and

deal in shares of other corporations, and the articles of incorporation of a mining company providing that the directors shall have the power to sell, assign, and transfer and convey and otherwise dispose of a part of the property, assets and effects of the corporation, less than the whole or substantially the whole thereof, on such terms and conditions as they may deem right and just, without assent of the stockholders, clothes the directors of a mining corporation with the power, when acting in good faith and with no personal advantage to themselves to exchange the mining property of the corporation for stock in another corporation, and the judgment of the directors as to the wisdom of the exchange will not be reviewed, where there is no evidence of inadequacy of consideration for the sale.

Butler *v.* New Keystone Copper Co. (Delaware), 93 Atlantic, 380, p. 382, February, 1915.

KNOWLEDGE OF DIRECTORS—ACQUIESCENCE NOT A RATIFICATION.

Where a secretary and manager of an oil company attempted to cancel an existing contract and made a settlement with a well driller and thereupon notified a majority of the directors of the corporation of the cancellation and settlement, the mere silence and acquiescence of the individual directors will not amount to a ratification of the act of the secretary and manager, as such a ratification by the directors could only be accomplished by a formal act on the part of the members when in session, and in such case the mere silence of the individual directors can not operate as an estoppel.

Blair *v.* Brownstone Oil Refining Co. (California), 143 Pacific, 1022, p. 1023.

POWERS OF MAJORITY OF STOCKHOLDERS—RIGHTS OF MINORITY.

Under the statute of Montana the holders of two-thirds of the issued stock of any Montana mining corporation may by vote authorize a sale of all the corporate property to the same extent as if all stockholders had consented thereto, and upon any such sale the mining corporation is dissolved and wound up as in other cases. A minority stockholder is powerless to prevent such a sale, as every stockholder consents to this statutory provision when he becomes a stockholder and it is part of his contract with the other stockholders and the corporation.

If a sale by two-thirds of the stockholders is fraudulent a minority stockholder may avoid the sale on the ground of fraud, or he may have an appraisal of his stock and compel a payment of its appraised value; but if he elects to have an appraisal of his stock he can not thereafter resort to his remedy for the fraud.

Wall *v.* Anaconda Copper Mining Co., 216 Fed., 242, p. 243.

POWER OF DIRECTORS TO DISPOSE OF ALL THE PROPERTY.

Neither the directors nor the stockholders of a prosperous mining corporation have power to sell all, or substantially all, the property of the corporation over the objection of the holder of a single share of stock; but if the business is unprofitable, the enterprise hopeless, and the mine a disappointment, and the further development unprofitable and unwise, then the holders of a majority of stock may, even against the dissent of the minority, sell all the property of the corporation with a view of winding up the corporate affairs. And where the charter provisions are broad enough to include such sale within the corporate purpose, it will be within the power of the majority of the stockholders to so sell, in any event, as against the protest of a minority of the stockholders.

Butler *v.* New Keystone Copper Co. (Delaware), 93 Atlantic, 380, p. 382, February, 1915.

CAPITAL STOCK NOT PAYABLE IN DEPRECIATED PROPERTY.

The laws of Missouri do not contemplate or permit a corporation to be formed with a fictitious capital stock merely by designating in the articles of incorporation that the capital stock consists of property of a named valuation; and stockholders of a mining corporation can not escape personal liability on their stock subscription by showing that the articles of incorporation state that the capital stock was fully paid in certain mining property taken at a stated value, and a judgment creditor of the corporation seeking to enforce the personal liability of stockholders is not estopped to claim that the stock is not fully paid up.

Rogers *v.* Stag Mining Co. (Missouri Appeals), 171 Southwestern, 676, p. 679, December, 1914.

RIGHT OF STOCKHOLDER TO EXAMINE PROPERTY.

A stockholder in a mining corporation is entitled to examine the mining property of the corporation and this includes the right to be accompanied by an expert.

Hobbs *v.* Davis (California), 143 Pacific, 733, p. 734.

SALE OF STOCK—SPECIFIC PERFORMANCE.

In an action by the purchaser of mining stock to compel the specific performance of a contract of sale by another stockholder and the transfer to him of the shares of stock under the agreement, a court of equity will not decree the specific performance of the agreement where the purchase price was $255,000 for stock of the intrinsic value of $624,000, and where the purchaser had paid only $1,000, and he had failed to make other payments according to the terms, and where time was specified to be of the essence of the contract, and

the sums paid on the contract were to be forfeited in case of the failure of the purchaser to complete the agreement; and the buyer can not justify his default in such payments on the ground that the seller had refused him the privilege of examining the mining property, such refusal being the alleged efficient cause of the buyer's default, where the buyer himself was a stockholder and had the right as such to inspect the mining property, and where the inspection of the property was not made a condition to the performance of the buyer's agreement.

Hobbs *v.* Davis (California), 143 Pacific, 733, p. 734.

FRAUDULENT SALE OF MINING STOCK—DUMP PART OF MINE—PRESUMPTION AS TO VALUE.

In an action for damages for false and fraudulent representations in the sale of stock of a mining corporation, and where the false statement was to the effect that there was a half million dollars' worth of ore on the dump ready to mill and sufficient to run a mill from three to five years, on proof that the officers of the corporation reported the mine as worthless, together with proof tending to show an abandonment of the property, a jury may assume that the dump, which was a part of the mine, was also worthless.

Rogers *v.* Rosenfeld (Wisconsin), 149 Northwestern, 33, p. 36, October, 1914.

FRAUDULENT SALE OF MINING STOCK—DAMAGES.

In an action for damages for false and fraudulent representations in making a sale of stock in a mining company, where the stock was falsely represented to be worth 50 cents on the dollar, and where the proof showed that the market value of such stock was nothing, or not to exceed 5 cents per share, the defendant can not complain where the jury found damages in favor of the plaintiff of less than 50 cents per share.

Rogers *v.* Rosenfeld (Wisconsin), 149 Northwestern, 33, p. 36, October, 1914.

SALE OF MINING STOCK—LIABILITY FOR FRAUDULENT REPRESENTATIONS.

The owner of stock in a mining corporation who, for the purpose of inducing another to purchase the stock, stated to him that he had just returned from the mining property and that there was ore enough on the dump at the mine to run a mill from three to five years, that it was high-grade ore, and that there was a half million dollars' worth of ore on the dump ready to mill, was held liable on proof that the representations were false, and such representations, when relied upon, do not constitute a mere expression of opinion, but were statements of facts on which the purchaser had a right to rely.

Rogers *v.* Rosenfeld (Wisconsin), 149 Northwestern, 33, p. 35, October, 1914.

SALE OF MINING STOCK—FRAUD—PERSONAL INVESTIGATION BY PURCHASER.

In an action on a promissory note given in payment of the purchase price of mining stock, the maker of the note can not defend on the ground of fraud and false representation where the evidence shows that the purchaser of the stock, the maker of the note, made the purchase on the result of his own investigation and not in reliance on the statements made by the payee or in the company's prospectus; and the statute of Connecticut imposing a penalty for making false statements as to the value of stocks, bonds, or property has no application where the evidence shows that the purchaser did not rely upon and was not misled or deceived by the statement of the seller.

Meech *v.* Malcolm (Connecticut), 92 Atlantic, 657, p. 659, December, 1914.

PURCHASE OF STOCK—PURCHASE SUBJECT TO PRIOR AGREEMENT TO SELL.

A purchaser of the stock and bonds from a stockholder of a mining corporation with actual notice that his vendor, the stockholder, has by contract bound himself to transfer such stock and bonds to another and that suit was then pending for the specific enforcement of such contract, takes title to such stock and bonds subject to the terms of the vendor's original contract and the judgment rendered in the pending suit.

Peoples Bank, etc., *v.* Columbia Collieries Co. (West Virginia), 84 Southeastern, 914, p. 916, April, 1915.

CONTRACT BY SOLE STOCKHOLDER FOR SALE OF PROPERTY—SPECIFIC PERFORMANCE.

A person who owns all the stock in a mining corporation and who has contracted with another, on a sufficient consideration, to cause the real estate of the corporation to be conveyed to such other contracting party may be compelled in an action for specific performance of the contract, no rights of creditors of the corporation being involved, to complete the contract and cause the property to be conveyed according to its terms.

Peoples Bank, etc., *v.* Columbia Collieries Co. (West Virginia), 84 Southeastern, 914, p. 917, April, 1915.

INVALID ISSUE OF STOCK—RIGHT TO VOTE.

The transferee of stock of a mining corporation, who takes the same with notice and knowledge that the stock was illegally issued by the corporation to itself, may be prevented from voting such stock at a corporate election.

Deal *v.* Erie Coal & Coke Co. (Pennsylvania), 93 Atlantic, 829, p. 832, January, 1915.

JUDGMENT AGAINST MINING CORPORATION—CONTINUANCE OF LIEN.

A judgment against an insolvent corporation taken for materials and supplies furnished the bondholders while in possession and used for the purpose of preserving the property as security for the bonds, will continue to be a lien upon the property of the corporation where the bondholders purchased the property under foreclosure proceedings and thereupon organized a new company as a holding company to take the title to the property, but no consideration was paid for the purchase of the property by the new company except the interest its incorporators owned as bondholders.

Spadra-Clarksville Coal Co. *v.* Kansas Zinc Co. (Kansas), 145 Pacific, 571, January, 1915.

RAILROAD COMPANY LIABLE FOR BONDS OF MINING COMPANY.

A railroad company owning the controlling interest of an insolvent coal company entered into a plan of reorganization of the coal company by which the new company issued bonds for the purpose of raising funds to carry on its enterprise, and at the same time executed a lease of its mining property. The railroad company thereupon entered into a contract with the lessee by which it agreed to pay a stated sum per ton for a stated number of tons per year for coal shipped by it, the payments to be applied in discharge of the coal company's bonds.

The coal lessee complied with its part of the agreement, was ready to, and did mine the minimum amount of coal. The railroad company failed to furnish cars sufficient to transport the coal mined, and it was held liable in damages in an action by the trustee of the bondholders for losses sustained by them for its failure to perform its part of the agreement and furnish cars necessary to transport the coal mined; and it was no defense for the railroad company, against its own wrongdoing, to claim that under the requirements of the Interstate Commerce Commission and the State railroad commission it was required to distribute its cars among all coal operators on its line in the ratio of their relative needs, as the railroad owned and controlled the coal company and was manipulated by the railroad company for its own purposes and in its own interests.

Wheeling & Lake Erie Railway Co. *v.* Carpenter, 218 Fed., 273, p. 280.

PURCHASE OF ASSETS OF ONE BY ANOTHER—LIABILITY.

Where one corporation transfers all of its assets to another and practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation; and the same rule applies where one corporation goes out of existence by being

merged into or absorbed by another, and in all such cases the liabilities of the old corporation are enforceable against the new, on the principle that equity impresses a lien on the property thus taken over for the benefit of the creditors of the old concern. But the rule does not apply where one corporation merely sells a part of its property to another and does not cease to exist, and in such case there would be no liability on the part of the purchasing corporation for debts of the seller.

Carter Coal Co. *v.* Clouse (Kentucky), 173 Southwestern, 794, p. 796, March, 1915.

PURCHASING CORPORATION NOT LIABLE FOR DEBTS OF SELLER.

The fact that one mining corporation purchased some 15,000 acres of coal lands of another corporation and operated a mine on the land purchased is not sufficient to make the purchasing corporation liable to an injured miner for injuries received prior to the time of the purchase, where both the selling and buying corporation continued their existence as separate corporations and were not merged into one corporation; and the fact that one person is a stockholder in both corporations is of no weight in determining the liability of the purchasing corporation.

Carter Coal Co. *v.* Clouse (Kentucky), 173 Southwestern, 794, p. 794, March, 1915.

FAILURE TO PAY CORPORATION TAX—LIABILITY AND FORFEITURE OF FRANCHISE.

The statute of Colorado imposes an annual corporation tax on corporations of that State and provides that nonpayment of the taxes shall work a forfeiture of the corporate franchise, and provides also that an action of debt will lie for the recovery of the tax. In an action of debt by the State against a mining corporation for taxes overdue the corporation can not defend on the ground that its failure to pay the taxes for the first year operated as a forfeiture of its franchise, where it appears that the corporation continued in business for the succeeding years and was still exercising its right and still conducting its business.

Pinnacle Gold Mining Co. *v.* People (Colorado), 143 Pacific, 837, p. 839.

BREACH OF CONTRACT TO FINANCE.

Where shares of stock of a mining corporation were issued and delivered to a person in consideration that he finance the corporation and advance money for the working of its mines, it is no defense in an action against him for a breach of the agreement to show that he had contracted with and paid a third person to furnish the money and that such third person had failed to do so.

Cerro Cobre Development Co. *v.* Duvall (Arizona), 147 Pacific, 695, p. 699, March, 1915.

LIABILITY FOR MALICIOUS PROSECUTION.

A coal mining corporation may be liable in an action for damages for malicious prosecution though such prosecution was procured to be made by its superintendent acting in furtherance of the business of the corporation; and the person or corporation starting the malicious prosecution is liable for its continuance and for the malfeasance of the officer making the arrest.

Lyons *v.* Davy Pocahontas Coal Co. (West Virginia), 84 Southeastern, 744, March, 1915.

LIABILITY FOR TORT—PARTICULAR ACTS AS EVIDENCE.

The fact that a mining corporation paid the compensation of certain deputy constables and peace officers appointed by the court of quarter sessions of the county, and which were appointed to perform the duties of police officers, and where it appears that the services of such deputies were not performed on the property of the mining corporation but on the public highway, is not sufficient to render the mining corporation liable for damages for assaults and batteries committed by such deputies and police officers.

Ruffner *v.* Jamison Coal & Coke Co. (Pennsylvania), 92 Atlantic, 1075, January, 1915.

INSOLVENCY—ACT OF BANKRUPTCY.

Where a mining corporation had executed a chattel deed of trust covering its entire property, and because of insolvency had failed to make payments as provided in the chattel deed of trust and the trustee had taken possession of the property and had advertised the same for sale, the failure of the mining corporation or of the trustee to vacate a judgment and the levy of the execution within five days prior to the sale did not constitute an act of bankruptcy and did not give the execution creditor a preference.

Moark-Nemo Consolidated Mining Co., In re, 219 Fed., 340.

BANKRUPTCY—RECEIVER—PREFERENCE CLAIM FOR SERVICES.

A receiver of a mining corporation who was a capable mining man and superintendent of the company's business and was engaged at the mine for two months before the company went into the hands of the receiver is entitled to preference for the reasonable amount of his services.

German National Bank *v.* Young (Arkansas), 169 Southwestern, 1178, p. 1180, July, 1914.

INSOLVENCY—PERSONAL LIABILITY OF STOCKHOLDERS.

The obligation arising on an implied contract of a corporation to pay for coal wrongfully mined from the property of another and not paid for is a "debt unpaid" within the meaning of section 1204 of

the General Statutes of Kansas, 1889, providing that if any corporation be dissolved leaving debts unpaid suit may be brought against any person or persons who were stockholders at the time of such dissolution; but any such claim is barred by the three years' statute of limitations, and a suit against a stockholder for such a claim can not be maintained when four years have elapsed since the corporation suspended business.

Abernathy *v.* Loftus (Kansas), 147 Pacific, 818, p. 820, April, 1915.

MINING CLAIMS.

GENERAL FEATURES.

MINING LOCATIONS ON APEX OF VEIN.

The course of a vein appearing on the surface is the course of its apex, and as a miner is required to locate his claim along the vein this means that he must locate it along the outcrop or course of the apex if it is found impracticable for him to locate it along the strike of the vein.

Stewart Mining Co. *v.* Bourne, 218 Fed., 327, p. 329.

OWNERSHIP OF ORE—PRESUMPTION.

Presumptively all ore bodies found beneath the surface of an abandoned mining claim belong to the owner of the claim.

Stewart Mining Co. *v.* Bourne, 218 Fed., 327, p. 328.

CONTRACT TO CONVEY MINING CLAIMS—EQUITABLE RIGHTS AND TITLES.

The owner of certain mining locations and holding options to purchase other mines entered into a contract with a corporation by which, in consideration of the assignment of the capital stock of the corporation, he promised and agreed to transfer such mining locations and options to the corporation; and when pursuant to such contract the corporation did assign to him its shares of the capital stock, the property in the mining locations and in the options will be deemed to have passed to the corporation under the rule that equity will regard that as actually done which ought to have been done; and the person so receiving the shares of stock can not thereafter transfer a valid title to the mining locations and to the options to another corporation with notice and knowledge of the agreement and of the fact that the stock had been transferred; and the contracting corporation may compel a conveyance of the mining locations and the transfer of the options by the corporation or person so receiving the same.

Cerro Cobre Development Co. *v.* Duvall (Arizona), 147 Pacific, 695, p. 699, March, 1915.

RIGHTS OF HEIRS—POWER OF ADMINISTRATOR TO CONVEY.

The equitable title to mining claims held under a contract of purchase, passes, on the death of the purchaser, to his heirs at law subject to be divested by the administrator of the estate for the purpose of paying debts and expenses of administration; but if there is ample personal property in existence to pay such debts and expenses without resort to the real estate, then the administrator has no authority to dispose of the property in such mining claims; and any attempt to forfeit or waive the title of the heirs at law to such equitable right in such mining claims would be unavailing, and the unauthorized deed of the administrator would not have the effect of divesting the title of the heirs at law in the mining property.

Costello *v.* Cunningham (Arizona), 147 Pacific, 701, p. 708, March, 1915.

AGREEMENT TO PURCHASE—TRUST—TENANCY IN COMMON.

An agreement between two persons by which they were to purchase mining claims and acquire title to others by location, title to all of which was to be taken in the name of one of the contracting parties in trust for the use and benefit of both, makes the one receiving the title trustee for both, and also creates a relation of tenancy in common of the property.

Costello *v.* Cunningham (Arizona), 147 Pacific, 701, p. 708, March, 1915.

LOCATION NOTICE AND CERTIFICATE.

RECORD—RECITALS AS EVIDENCE.

The record of a location notice, reciting the citizenship of the locators, the fact of discovery of mineral, and that the location had been marked upon the ground, is not even prima facie evidence of the truth of the recital, for the reason that no such facts are required to be stated in any of the statutory notices, but such facts in a controversy over the location must be established by proof outside of the location certificate.

Childers *v.* Laham (New Mexico), 142 Pacific, 924, p. 925.

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Under the Federal statute and the statute of New Mexico the record of a mining location is required to contain nothing more than the names of the locators, the date of location, and the description of the claim by reference to some natural object or permanent monument as will identify the claim; but the posting of a location notice, the discovery of mineral, and marking on the ground of the boundaries of the claim are not required to be recited in the location notice.

Childers *v.* Laham (New Mexico), 142 Pacific, 924, p. 925.

ASSESSMENT WORK—CONSIDERATION.

PROOF OF ANNUAL LABOR.

The opinion of a witness, not qualified as an expert as to the value of annual labor performed on a mining claim, can not be prejudicial where the court instructs the jury as to the legal rights of the parties as to the amount of labor necessary to be done in order to hold the claim.

Cache Creek Mining Co. *v.* Brahenberg, 217 Fed., 240, p. 242.

ASSESSMENT WORK PERFORMED BY STRANGER.

Work on a mining claim performed by a brother of the deceased owner of such claim, for the purpose of keeping the claim alive, and making assets for the estate of the deceased brother, out of which a claim held by him against the estate could be paid, will not save the claim from relocation, where the executors, legatees, and devisees under the will of the deceased owner refuse to recognize and adopt the work done as assessment work upon the claim, and where, after the expiration of the year and subsequent to the date of relocation, they began the performance of independent assessment work.

McDonald *v.* McDonald (Arizona), 144 Pacific, 950, p. 955, December, 1914.

COOWNER PREVENTED FROM PERFORMING.

The interest of a coowner in a mining claim can not be forfeited, as provided for by section 2324 of the Revised Statutes of the United States and section 1426–o of the Civil Code of California, by another coowner, where such coowner or the persons or corporations for whom he held an interest in the mining claim forcibly prevented him from completing the assessment work and forcibly ejected and drove him from the mining claim while in the act of performing the assessment work.

Thompson *v.* Pack, 219 Fed., 624, p. 625, December, 1914.

RELOCATION.

FAILURE TO PERFORM ASSESSMENT WORK—ENTRY NOT A TRESPASS.

A brother of a deceased owner of a mining claim who, before the expiration of the year, went upon the claim for the purpose of performing the assessment work and to prevent forfeiture and relocation, and who during the time and after the expiration of the year occupied a house on the claim, can not be regarded as a trespasser where the executors and legatees and devisees under the will of his deceased brother refused to recognize or adopt the work done by him as assessment work and where after the expiration of the year

and before other work was commenced, he relocated the mining claim for his own benefit and where it appeared that he occupied the house with the consent of such executors, legatees, and devisees.

McDonald *v.* McDonald (Arizona), 144 Pacific, 950, p. 955, December, 1914.

PERSON ENTERING TO RELOCATE NOT A TRESPASSER.

An unpatented mining claim under section 2324 of the Revised Statutes of the United States is subject to relocation if the required amount of assessment work has not been performed; and a person who enters upon the claim after midnight of December 31 for the purpose of making a relocation because of the failure to perform the assessment work for the preceding year is not a trespasser.

McDonald *v.* McDonald (Arizona), 144 Pacific, 950, p. 956, December, 1914.

FORFEITURE.

PLEADING FORFEITURE.

In a suit to determine an adverse claim to a mining location it is sufficient in pleading a forfeiture of the rights of the plaintiff to aver "all of plaintiff's right to and in said claim became forfeited and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land," and especially in connection with the further averment that the plaintiff had not performed the annual labor required by law for a period of three years or more.

Cache Creek Mining Co. *v.* Brahenberg, 217 Fed., 240, p. 241.

FORFEITURE OF COOWNER'S INTEREST.

Section 2324 of the Revised Statutes of the United States and section 1426–o of the civil code of California provide for the forfeiture of a part interest in a mining claim on the failure of the coowner to perform or to contribute to the performance of the assessment work.

Thompson *v.* Pack, 219 Fed., 624, p. 625, December, 1914.

EXTRALATERAL RIGHTS.

VEIN TERMINATING WITHIN LOCATION.

A mining locator can not enforce extralateral rights on a vein that enters his claim through one of its side lines and in its course or strike does not pass out of the claim at all.

Stewart Mining Co. *v.* Bourne, 218 Fed., 327, p. 329.

POSSESSORY RIGHTS.

ADVERSE POSSESSION—PROOF OF LOCATION.

An adverse possession of a mining claim for the statutory period is not available to a plaintiff in an action of ejectment unless the location is completed and proved; and an admission in the answer of a defendant in such an action of the existence of a valid location by the plaintiff's grantors is not available to the plaintiff if he fails to call it to the attention of the trial court, otherwise such an admission might be sufficient to avoid the necessity of proof of location.

Childers *v.* Laham (New Mexico), 142 Pacific, 924, p. 925.

INJUNCTION TO PREVENT CLOUD ON TITLE.

A coowner of a mining claim who while in the act of performing assessment work was forcibly prevented from completing the same and was forcibly ejected and driven from the claim by his coowner, or by persons or corporations for whom the latter held an interest in the claims, may enjoin such coowner from placing on record the notice of forfeiture with the affidavit of service thereof, as provided for by section 1426–o of the Civil Code of California, as this would constitute a cloud on owner's interest.

Thompson *v.* Pack, 219 Fed., 624, p. 626, December, 1914.

ADVERSE POSSESSION—PAYMENT OF TAXES.

Section 2405, Revised Statutes of Utah (1908), provides that all mines and mining claims shall be taxed at the price paid the United States therefore, unless the surface ground or some part thereof is used for some purpose other than mining and has a separate and independent value, in which case it shall be taxed at its value for such other purpose. Section 2868, Compiled Laws of Utah (1907) provides that adverse possession of real estate can not be established unless it has been occupied and claimed for a period of seven years continuously and the occupant or his grantors has paid all taxes levied and assessed upon such land. But this latter section does not prevent the occupant of a mining claim from obtaining title by adverse possession where the surface of such mining claim was valuable for purposes other than mining and had been assessed for taxes because of its value for such other purposes, and persons other than the occupant had paid such taxes, and where the descriptions of the parts of the surface so assessed for other purposes were so defective as to make the assessment invalid.

Utah Copper Co. *v.* Chandler (Utah), 142 Pac., 1119.

OWNERSHIP OF VEIN OR LODE—CONCLUSIVENESS OF JUDGMENT.

In an action to determine the ownership and possession of a certain vein or lode of ore, a judgment awarding the property to the plaintiff is not conclusive in a subsequent suit by the same plaintiff against a lessee of the defendant in the original action, where such lessee took possession of the property long prior to the institution of the original suit.

Doctor Jack Pot Mining Co. *v.* Marsh, 216 Fed., 261.

SALE AND TRANSFER.

FRAUD IN PURCHASING—RECOVERY.

An action in the nature of indebitatus assumpsit or debt may be maintained for the difference between $25,000 and $625 against a person who, pretending and professing to act for himself, and others, falsely and fraudulently represented to them that he could purchase certain mining claims for the sum of $25,000 and relying upon such representations the persons to whom the representations were made advanced the sum of $25,000 for the purchase of the mining claims, where the party making the purchase paid but $625 for the mining claims and appropriated the remainder to his own use; and one of such purchasers who conspired with the persons making the representations and received a part of the difference between the $25,000 and the $625, is liable to the other purchasers for such part so received by him, though he himself had no contractual relations with the other purchasers. Persons suing in such an action may waive the tort and sue the party making the representations for the balance of the money so obtained.

Reyer *v.* Blaisdell (Colorado Appeals), 143 Pacific, 385.

TRESPASS.

OWNERSHIP OF ORE WRONGFULLY MINED.

The description in the mortgage of a mining corporation reciting that all the real property of the mining corporation situated in the county and particularly described, also all lodes, mineral mining property, flumes, ditches, water rights, mill sites, and other mining properties that may thereafter be acquired by the corporation, by location, purchase, or in any other manner whatsoever, can not be extended beyond the import of the descriptive instrument and therefore a reasonable meaning and the intent of the parties can not be held to include ores wrongfully mined and taken from the mining property adjoining the property of the corporation executing the mortgage, for the purpose of holding the mortgagee as a trustee of the owner of the wrongfully mined ore.

Clinton Mining & Mineral Co. *v.* Trust Co., etc. (South Dakota), 151 Northwestern, 998, p. 999, April, 1915.

ORES WRONGFULLY MINED—EFFECT OF MORTGAGE.

Ores wrongfully mined from a mining claim by a mining corporation owning an adjoining claim and which had mortgaged all its property, including all lodes, mineral and mining property that may be acquired by location, purchase, or in any other manner whatsoever, can not be included within the terms of such mortgage for the purpose of making the mortgagee a trustee for the benefit of the owner of the ores so wrongfully mined.

Clinton Mining & Mineral Co. *v.* Trust Co., etc. (South Dakota), 151 Northwestern, 998, p. 999, April, 1915.

PLACER CLAIMS.

EFFECT OF PATENT ON KNOWN LODES.

A placer patent is, except in cases of fraud, a conclusive determination, made by a special tribunal having jurisdiction to determine, that the land conveyed contains no lodes or mineral lands, and the patent conveys the lands, though mineral or containing lodes, but by defeasible title if secured by fraud; but such title is valid against all the world save that when secured by fraud the United States by direct suit if brought within time may annul the patent and divest title.

Barnard Realty Co. *v.* Nolan, 215 Fed., 996, p. 1000.

PATENTED PLACER CLAIM—PROOF OF KNOWN LODE.

Proof to establish that a lode was known to exist when a placer patent was applied for must show that at that time the lode was clearly ascertained and defined and of such known extent and content that in view of all circumstances and conditions affecting its worth, such as the importance locally attached to like lodes under similar conditions, ease or difficulty of development, facilities for ore treatment, cost of mining and reducing ores, with the reasonable probabilities of development, it would then have justified location and development, and by reason of which it and the area attaching to, or excluded with it, were then more valuable than for placer mining purposes.

Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 963.

KNOWN LODE—WHAT CONSTITUTES.

Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a "known lode" within the exclusion of the placer mining law; but to be impressed with such character the lode must, at the time of application for placer patent, be clearly ascertained and defined and of such extent and content

that it will then, in view of present conditions, justify development and exploitation, and because of which the placer claim is valuable and more valuable than for placer mining purposes. Subsequent development, however marvelous the results, is immaterial if the lode be not thus "known" when the application for the placer patent is made.

Barnard Realty Co. *v.* Nolan, 215 Fed., 996, p. 999.
Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 964.

KNOWN LODES—PLACER PATENT.

Neither a deed for a placer location nor a lode location upon the land by the placer applicant himself is prima facie evidence of a known lode, and both are deprived of all value by evidence of the nonexistence of a lode, and a lode subsequently located within the placer limits can not be "known to exist" at the time of a placer application for patent, where it appears that it was in fact discovered in the bedrock when the placer deposits were removed by extensive work long subsequent to the patent application.

Barnard Realty Co. *v.* Nolan, 215 Fed., 996, p. 998.

TITLE TO KNOWN LODES.

Known lodes, though unidentified and indefinite, are excepted and excluded from placer patents, and title to them remains in the United States, and at any time thereafter they may be, by strangers to the patent, possessed, located, and patented as any other lode upon public lands.

Barnard Realty Co. *v.* Nolan, 215 Fed., 996, p. 999.

KNOWN LODES—JUDGMENT QUIETING TITLE.

A decree in an action to quiet title to a placer location as against conflicting lode claims is not res judicata in respect to the United States and persons not parties, and such persons can relocate the lodes and relitigate the issue over and over, and if no title as to such known lodes passes by the placer patent it must remain wholly in the United States and neither laches nor limitations can vest title in the placer patentee.

Barnard Realty Co. *v.* Nolan, 215 Fed., 996, p. 1000.

APPLICATION FOR PLACER PATENT—OWNERSHIP OF KNOWN LODES.

Where lodes known to exist are excepted from a placer grant, title to them continues in the United States and they are open to location as lodes in public land by third persons at any time.

Clark Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 963.

APPLICATION FOR PLACER PATENT—KNOWN LODES EXCEPTED.

In an application for a placer patent the Land Department requires evidence as to the character of the land, and if the proof shows the existence of known lodes within a placer claim the applicant is required to survey them and if not claimed and included in his application he is required to exclude them and may then enter and pay for the net area of his placer claim and the patent conveys to him the net area alone; but if the proof shows there are no known lodes existing within the placer limits the applicant enters and pays for the entire area of his placer claim and patent issues covering the whole thereof. The law does not authorize the Land Department to insert in a patent an exception as to the existence of lodes within the placer limits broader than the law implies.

Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 963.

ANNUAL LABOR ON LODE CLAIMS WITHIN PLACER LIMITS.

Proof of the annual labor made in good faith on lode locations within placer limits is immaterial on the question of the knowledge of the existence of the lodes at the time of the placer application.

Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 964.

EFFECT OF PATENT FOR LODE ON PLACER CLAIM.

Subsequent patents for lode claims within the limits of a patented placer claim are immaterial on the question of the knowledge of the existence of such lodes at the time of the placer application, and the lode patents are not evidence of the known existence of such lodes at the time of the placer patent.

Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 965.

PATENTS.

PATENT FOR MINING CLAIMS—PRESUMPTIONS.

When a mining claim has been duly patented the conclusive presumption is that there was a discovery found within the limits of the patented claim, that the land was properly located and the boundaries of the claim so marked on the ground as to embrace not exceeding 300 feet on each side of the middle of the vein, and not exceeding 1,500 feet in length along the vein, and that all preliminary and precedent acts necessary to authorize and justify the issuance of the patent had been performed as the law required.

Stewart Mining Co. *v.* Bourne, 218 Fed., 327, p. 328.

PLACER PATENT—BURDEN OF PROOF AS TO LODES.

After the issuance of a patent for a placer claim a third person claiming the existence of a known lode within the placer limits has the burden of proving that such lode was known to exist when the placer patent was applied for and the proof must be clear and convincing, in quality and quantity that inspires confidence and produces conviction.

Clark-Montana Realty Co. *v.* Ferguson, 218 Fed., 959, p. 963.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

OHIO "RUN-OF-MINE" ACT.

The objects of the Ohio "run-of-mine" or antiscreen coal mine law of 1914 were to eliminate the objections to the "run-of-mine" basis of payment to miners and to enact a system fair alike to employer and miner. The first section provides for the payment of the miners according to the total weight of coal in a mine car as removed from the mine, with the percentage of impurities to be determined by the industrial commission of the State; and operators, under the provisions of the second section, are not obliged to compensate miners for everything sent out in mine cars, but the percentage of impurities as determined by the industrial commission is to be excluded from the calculation; and while the industrial commission is authorized to determine the percentage of impurities and enforce its orders relating thereto, yet the ascertainment of the commission is not a limitation upon the right of the operators and miners to agree upon deductions of their own arrangements as to the amount of slate, sulphur, rock, or dirt, and they may substitute their own agreement in that respect instead of that of the commission. The law does not prevent the operators from screening their coal as they see fit for other purposes and fit it for market in such wise as they may deem advisable; but the provision for screening is for the purpose only of calculating the amount to be paid miners for mining coal. The statute does not make the orders of the industrial commission final or conclusive, but makes them only prima facie reasonable, and operators are entitled, upon petition, to a hearing upon the reasonableness of any order and are given the right to bring an action in the supreme court to test the reasonableness or validity of any such order. The statute is not unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by operators to miners for the production of coal, under the constitution of Ohio,

which provides that laws may be passed "for the regulation of methods of mining, weighing, measuring, and marketing coal, oil, gas, and other minerals."

Rail & River Co. *v.* Yaple (Ohio Industrial Commission), 236 U. S., 338, p. 345.

STATUTORY PROVISION NOT VARIED BY A CUSTOM.

While the duties and liabilities of a mine operator and a miner may sometimes depend upon a custom of the mine where there is no statute covering the subject, yet where a statute speaks on the subject the terms of the statute can not be modified by proof of a custom contravening the statute; and accordingly where a statute imposes upon the mine operator the duty of furnishing props and caps only after the miner has selected and marked the same an injured miner in an action for damages can not prove a custom of the mine by which the mine operator furnished the props and caps without such marking, as a custom of the mine contrary to the provisions of the statute is void, the very purpose of the statute being to do away with uncertain conditions and to prescribe with reasonable certainty the duties and liabilities of the mine owner and of the miner.

Palmer *v.* Empire Coal Co. (Kentucky), 172 Southwestern, 97, p. 98, January, 1915.

STATUTE—WORDS CHANGED.

In section 2739b of the Kentucky statutes, requiring mine operators to provide and furnish the miners a sufficient number of caps and props and requiring the miners to keep the roof propped, the word "worked" should be "marked" and the words "the same" following refer to the caps and props, so that the latter clause of the statute would read, "it is the duty of said miners to keep the roof propped, after the miner has selected and marked the caps and props."

Palmer *v.* Empire Coal Co. (Kentucky), 172 Southwestern, 97, p. 98, January, 1915.

COMMON-LAW RIGHTS ABOLISHED.

The mining statute of West Virginia transfers liability which the common law would impose upon the operator of a mine to the shoulders of the mine foreman and abrogates the common-law right of action of the injured miner against the mine operator; and this imposition of liability upon the mine foreman is in derogation of his common-law right of service without it, and the abrogation of the injured servant's right of action against the mine operator is also in derogation of his common-law right as an employee, and the statute accordingly ought not and can not have a construction and effect beyond that clearly indicated by its terms.

Crockett *v.* Black Wolf Coal & Coke Co. (West Virginia), 83 Southeastern, 987, p. 988, December, 1914.

IMMUNITY AFFORDED OPERATOR.

The immunity of employers of labor in coal mines, given by the statute providing for the appointment of mine foremen and prescribing their duties, is limited to the duties so imposed upon each mine foreman in express terms or by clear implication arising out of the terms of the statute; but it does not extend generally to omissions or failure to exercise reasonable care and diligence to provide and maintain suitable and safe machinery, tools, and appliances for use by the miners as instrumentalities in the performance of their duties.

Crockett *v.* Black Wolf Coal & Coke Co. (West Virginia), 83 Southeastern, 987, p. 988, December, 1914.

REGULATING MINES—POLICE REGULATIONS.

The statute of Kansas, chapter 222, Laws of 1911, is not unconstitutional and invalid because compliance with the act involves a greater expense to mining companies than do other statutes relating to mining operations, where there is no showing that the requirements are confiscatory or unreasonable in consideration of the object to be attained; nor is it unconstitutional because the act is discriminatory in that it places burdens upon coal-mine operators, while the operators of lode, zinc, gypsum, and salt mines are free from such burdens.

State *v.* Reaser (Kansas), 145 Pacific, 838, p. 839, January, 1915.

WASHHOUSES.

Chapter 222, Kansas Laws of 1911, requiring operators of coal mines to maintain washhouses in connection with their mines is a police regulation, and the determination of the necessity and wisdom of a police regulation rests with the legislature, and if there is reasonable grounds for exercising such power the courts should not interfere, and the particluar act in question contemplated the health and comfort of the employees, and the framers of the law will be presumed to have been possessed of such general knowledge and to have made such special investigations of the conditions at coal mines as to them was deemed necessary to justify the enactment of the statute.

State *v.* Reaser (Kansas), 145 Pacific, 838, p. 839, January, 1915.

GUARDING SHAFTS AND DRIFTS—DITCHES NOT INCLUDED.

The statute of Montana declaring a penalty for sinking any shaft or running any drift or cut without guarding it does not include a trench or sewer in a city for the purpose of laying sewer pipe.

McLaughlin *v.* Bardsen (Montana), 145 Pacific, 956, January, 1915.

RAILROAD RIGHT OF WAY—TRAM ROAD NOT A RAILROAD.

A tramway built by a railroad company along a steep mountain side upon a steep grade with 12-pound rails, with only 20 inches between the rails, laid on ties 4 by 4 inches and 4 feet in length, not intended for use as an ordinary steam railroad, but intended to be used and in fact leased to and operated by mine owners for hauling ore from and supplies to its mines from and to steam railroad connections, a distance of less than 3 miles, the only cars used being ore cars of 2 to 3 tons' capacity drawn up the grade by horsepower and returned by gravity, is not a railroad within the meaning of the act of Congress entitled "An act granting to railroads the right of way over the public lands of the United States," approved March 3, 1875 (18 Stat., 482), so as to entitle the railroad company to claim 100 feet of ground on either side of the center of such tramway.

Denver & Rio Grande Railroad Co. *v.* Bolognese (Utah), 143 Pacific, 129, p. 132.

STATUTE REQUIRING CASH PAYMENT OF WAGES.

The statute of Tennessee, Acts 1913, chapter 29, making it a misdemeanor punishable by fine if a coal company or other corporation operating a supply store in connection with its business fails to pay in cash its employees at stated periods the wages due them, is in violation of the constitutional provision to the effect that the legislature shall pass no law authorizing imprisonment for debt in civil cases, as the act while not directly authorizing imprisonment for debt, does attempt to create a crime for the failure to pay in cash, and for such crime provides a penalty, which may or may not be followed by imprisonment, and is an indirect imposition of imprisonment for the nonpayment of debt, and is therefore clearly within the constitutional inhibition.

State *v.* Pend (Tennessee), 170 Southwestern, 56, October, 1914.

STATUTE PROHIBITING THE ISSUE OF SCRIP IN PAYMENT FOR SERVICES.

The statute of West Virginia prohibiting under penalty any corporation, company, or person from issuing or giving to any employee any scrip, token, draft, check, or other evidence of indebtedness, payable or redeemable otherwise than in lawful money, and providing that any such scrip, draft, check, or other evidence of indebtedness shall be taken and held to be a promise to pay the sum specified therein in lawful money, is not in violation of the Federal Constitution and does not impose undue restrictions upon the liberty of contract and does not violate any constitutional provision and is not an illigitimate exercise of the State's police power; but the statute is constitutional and valid.

Atkins *v.* Grey Eagle Coal Co. (West Virginia), 84 Southeastern, 906, p. 907, March, 1915.

INSPECTION OF ILLUMINANTS USED IN MINES.

The Alabama statute of 1911, Acts of 1911, p. 568, entitled an act "to regulate the inspection and use of illuminants in mines in the State of Alabama and sales of illuminants for use in mines," is not in conflict with section 77 of the constitution of Alabama which provides that no State office shall be continued or created for the inspection or measuring of any merchandise or commodity, but permits any county or municipality to appoint such officers when authorized by law, as this constitutional provision was not designed to prevent the conferring upon and the exercise by State officers all inspecting powers, but to prevent the legislature from creating and continuing any State office for that purpose and it was not the purpose of the provision to prevent the inspection of commodities but to prevent the creation of offices solely for that purpose, where the statute does not create any office whatever but provides for the inspection of illuminants by the State mine inspector, an office created long before the enactment under consideration.

Wofford Oil Co. *v.* Burgin (Alabama), 66 Southern, 931, p. 932, December, 1914. Burgin, Ex parte (Alabama), 68 Southern, 49, January, 1915.

REPEAL OF INSPECTION ACT.

The statute of Alabama, Acts of 1911, page 568, entitled an act "To regulate the inspection and use of illuminants in mines in the State of Alabama and sales of illuminants for use in mines," revises the whole subject matter of the local act of 1901, page 1249, and must be construed as intending to set up a new system of inspection and as being designed as a substitute of the former act, and accordingly repeals the same.

Wofford Oil Co. *v.* Burgin (Alabama), 66 Southern, 931, p. 932, December, 1914. Burgin, Ex parte (Alabama), 68 Southern, 49, January, 1915.

REGULATION OF NATURAL-GAS RIGHTS.

The fixing of rates to be charged by public-service corporations to their customers in West Virginia is not an unlawful regulation of insterstate commerce, as the regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the interstate commerce statute; but neither the statute of West Virginia nor the orders of the public-service commission purport to interfere in any manner with the transportation of natural gas from that State to other States, and the statute does nothing except regulate prices of natural gas to the citizens of West Virginia, charged by corporations operating in that State under State authority; but the interflow of gas from Ohio and Pennsylvania into West Virginia, or out of West Virginia into Ohio and Pennsylvania, according to

the pressure from the main gas pipes, as common reservoirs, can not affect the power of the State of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens.

Manufacturers' Light & Heat Co. *v.* Ott, 215 Fed., 940, p. 944.

PUBLIC-SERVICE COMMISSION—DUTY AS TO OIL AND GAS.

In the public-service commission of the State of West Virginia the legislature of the State has not delegated its legislative power, but merely provided an agency for carrying out the legislative scheme with reference to public-service corporations, and the legislature may require of such commission the application of general rules to particular situations and the investigation of facts, with a view to making orders in a particular matter.

Manufacturers' Light & Heat Co. *v.* Ott, 215 Fed., 940, p. 943.

PUBLIC-SERVICE COMMISSION—GAS COMPANIES.

The term "gas companies" used in the public-service commission act of West Virginia, embraces companies furnishing natural gas, and the statute was enacted in view of the fact that a very large part of the gas consumed in the State was natural gas.

Manufacturers' Light & Heat Co. *v.* Ott, 215 Fed. 940, p. 944.

INTERSTATE SHIPMENT OF OIL—INSPECTION—INJUNCTION.

An injunction will lie under the statute of North Dakota for the inspection of oil to prevent the State oil inspector from holding up oil in transit from other States into North Dakota, for nonpayment of inspection fees, where such fees are materially in excess of the amount necessary to pay the expenses of inspection.

Bartel's Northern Oil Co. *v.* Jackman (North Dakota), 150 Northwestern, 576, p. 579, January, 1915.

INSPECTION OF OIL IN TRANSIT—FEES INVALID.

The statute of North Dakota providing for the inspection of oil during transit, brought from other States into North Dakota, and fixing the fee for such inspection materially greater than the cost thereof, becomes not only a police measure but a revenue measure, and to the extent that the fees exceed the reasonable necessary cost of inspection, the tax is invalid, as such statute is in conflict with the commerce provisions of the Federal Constitution.

Bartel's Northern Oil Co. *v.* Jackman (North Dakota), 150 Northwestern, 576, p. 580, January, 1915.

PERMITTING OIL TO ESCAPE—PROTECTION OF STATUTE.

A statute of Indiana, section 9062, Burn's Annotated Statutes, 1914, requires oil and gas produced from wells to be safely and securely confined in wells, pipes, or other safe and proper receptacles, and the purpose of the statute is to require persons producing live oil from wells securely and safely to confine it in receptacles on their premises to prevent its escape; and a person operating a dredge in the construction of a public ditch or drain is entitled to the benefit of the provisions of this act; and an oil-producing corporation that permitted its oil to escape from a tank where it was stored, and flow down into such ditch, against and around the dredge, is liable to the owner of such dredge where it was destroyed by reason of the oil accidently taking fire from the fire on the dredge, even in the absence of any question or allegation of negligence.

Rock Oil Co. *v.* Brumbaugh (Indiana Appeals), 108 Northeastern, 260, p. 263, March, 1915.

See Commercial Union Assurance Co. *v.* Gulf Refining Co. (Texas Civil Appeals), 174 Southwestern, 874, March, 1915.

OPERATION OF WORKMEN'S COMPENSATION LAW—ALLOWANCE FOR INJURY.

In an action by a miner under the workmen's compensation act of Kansas (Laws 1911, chap. 218; amended, Laws 1913, chap. 216), where the evidence showed that the miner's arm was broken and the freedom of its movement was permanently impaired, restricting his activity in the occupation in which he was engaged and in which he was earning $17.50 a week, the court found the plaintiff had suffered a total disability for six months following the accident and allowed him $210 on that account, with an additional allowance of $1,014 based upon the finding of partial disability for a period of six and one-half years; and under the statute it is within the discretion of the trial court to make the judgment for a lump sum or for periodical payments, and where there is no abuse of this discretion the judgment will not be interfered with on appeal.

Cain *v.* National Zinc Co. (Kansas), 148 Pacific, 1165, March, 1915.

ILLINOIS MINING ACT—EFFECT OF WORKMEN'S COMPENSATION ACT.

Section 1 of the compensation act of Illinois makes it optional with both the coal-mine operator and the miner whether or not they will accept the provisions of the act, and the application of such act being optional with either or both parties, the compensation act did not repeal the mining act and does not deprive an injured miner of a right of action under the Illinois mining act for injuries sustained by reason of the failure of a coal-mine operator to comply with the provisions of the mining act.

Eldorado Coal & Mining Co. *v.* Mariotti, 215 Fed., 51, p. 55.

STATUTORY RIGHTS AND DUTIES.

MINING RIGHTS ACQUIRED UNDER STATUTE—PROTECTION.

The statute of Missouri, section 8409, Revised Statutes of 1909, provides that when an owner or lessee of real estate permits another to enter and dig for lead ore or other minerals thereon with his consent, and such persons having in good faith dug or opened any shaft, mine, or deposit of mineral, or extended or opened from any shaft or mine any room, drift, or entry, such person shall have the exclusive right as against the owner to continue the work and mine and dig such shaft or deposit of mineral, and the statute protects a person, as against an action of ejectment by the landowner, who with the knowledge of such owner, and under an agreement with the lessee of the original owner, entered upon a part of the leased premises and engaged in mining in good faith, opened shafts and extended and operated shifts therefrom and assembled machinery for carrying on mining operations, as such person acquired a mining right under the statute and is not a trespasser, though the lessee on whose consent and agreement such person entered upon the mining property, forfeited the lease.

G. M. Mining Co. *v.* Hodge (Missouri Appeals), 170 Southwestern, 689, November, 1914.

DUTIES IMPOSED ON OPERATOR.

DUTY TO FURNISH PROPS—HEADERS INCLUDED IN STATUTE.

The statute of Kentucky, section 2739b, subsection 7, requires the owner or operator of every mine to provide and furnish to the miners a sufficient number of caps and props. The props referred to are upright posts wedged between the roof and the flooring to support the roof, while a cap is a square piece of plank or block wedged between the top of the posts and the roof to better hold the roof, while "headers" are longer pieces of plank extending over more of the roof and supported by two props, one at each end, and by the use of the header a larger area of roof can be held secure with fewer props, and in this way serves the purpose of a cap; the use of headers being customary and frequently necessary, they are necessarily embraced within the materials named in the statute; and a mine operator may be liable for failure to furnish a header when requested by a miner as for a violation of the statute.

Big Branch Coal Co. *v.* Wrenchie (Kentucky), 170 Southwestern, 14, p. 16, November, 1914.

PROVIDING SAFE PLACE.

One of the positive duties which the statute of Oklahoma imposes upon a coal-mine operator is to exercise care to provide a reasonably safe place for his miners to work, and the degree of care demanded of

him depends upon the natural dangers incident to the employment; and this means that a greater degree of care is required of a master who is a coal operator working his servants in a mine underground, than of a master who requires his servants to work in a less hazardous occupation out in the open; and the failure of a mine owner to discharge this positive duty constitutes primary negligence and renders him liable for any injury resulting therefrom.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 605, December, 1914.

The mine-foreman statute of West Virginia does not absolve the mine owner or operator from his common-law duty to exercise reasonable care to provide reasonably safe machinery, tools, and appliances for use in the mine, and make the mine a reasonably safe place for work, except in so far as this duty is devolved upon the mine foreman; nor does it absolve him from liability for injury resulting to a miner in the mine from the operator's failure to make such provision, or his provision of defective or unsafe appliances, or his failure of duty as to the safety of the mine as a place of work in those instances in which such duty is not cast upon the mine foreman.

Crockett *v.* Black Wolf Coal & Coke Co. (West Virginia), 83 Southeastern, 987, p. 988, December, 1914.

DUTY TO TIMBER MINE.

The statute of Oklahoma makes it the positive duty that the owner of a mine owes to his miners, after the mine is opened and timbered, to use reasonable care and diligence to see that the timbers are properly set and to keep them in proper condition and repair, and for this purpose he is required to provide a competent mine boss or foreman, to make timely inspection of the timbers as well as the roofs of the mine, to the end that the miners may not be injured by defects or dangers which a competent mining boss or foreman would discover and remove.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 605, December, 1914.

DUTY TO FURNISH SAFE APPLIANCES—TROLLEY WIRES.

The mining statute of West Virginia does not place the duty of inspection, oversight, and repair of the electrical trolley wires used to communicate power for haulage purposes in the mine upon the mine foreman and its terms are not broad enough to fix it upon him, in respect to the miner making actual use of such appliance, in the discharge of the duties he was performing under his contract of employment. The trolley wire used for the purpose of communicating power is an implement used in the miner's work, and the statute does not say that the mine foreman shall see that the miners are pro-

vided with safe or suitable tools and appliances, and accordingly the duty of maintenance of the safety of the trolley wire for such purpose was not devolved upon the mine foreman. The mine operator is therefore liable for the death of a miner caused by a defective trolley wire and the duty devolves upon him to inspect such wire and other similar machinery and appliances, as a matter of precaution for the safety of his miners; and in view of the dangerous character of trolley wires, the law requires the exercise of a high degree of care and diligence in the matter of inspction as well as other duties respecting it.

Crockett *v.* Black Wolf Coal & Coke Co. (West Virginia), 83 Southeastern, 987, p. 989, December, 1914.

OPERATOR TO FURNISH PROPS—DUTY TO PROP.

Subsection 7 of section 2739b, Kentucky Statutes, provides that the operator of every mine shall furnish to miners a sufficient number of caps and props to be used by miners in securing the roofs in their rooms and such other working place whether by law or custom of those engaged in such employment it is the duty of the miners to keep the roof propped; but does not by its terms impose the duty of propping the roof upon the miner or mine operator; but this duty may, by agreement or custom, be imposed upon either the miner or mine owner and proof of such custom is admissible, and it is also proper to prove that the United Mine Workers of America, a labor organization, had an agreement with the mine operator by which it was the duty of the machine operator to direct his "loaders" to prop the roof and if they did not do so and it became dangerous, the miner should thereupon report it to the boss.

Old Dominion Coal Co. *v.* Denney (Kentucky), 169 Southwestern, 1016, p. 1017, October, 1914.
Borderland Coal Co. *v.* Small (Kentucky), 170 Southwestern, 8, p. 9, November, 1914.

DUTY TO PROVIDE SAFE APPLIANCES—DERAILING SWITCH.

A complaint is sufficient if it charges that the defect in the condition of the ways, works, machinery, or plant consisted in the negligent failure of the operator to provide or maintain a dead latch or derailing switch to derail the cars on becoming loose on the incline in the mine and by reason of which a trip of cars, being hauled up the slope, became loose and ran back down the slope upon the miner.

Burnwell Coal Co. *v.* Setzer (Alabama), 67 Southern, 604, p. 605, December, 1914.

DUTY TO FURNISH SAFE HAULAGEWAYS.

Under the general provisions of the Pennsylvania statutes placing the workings of a mine under the mine foreman's charge and supervision, and under certain special provisions to be found in the stat-

utes, he is responsible for all work in the course of the construction of passageways and for their future proper support, for the effect of all temporary delay in operations therein and for the proper maintenance of the appliances used in such operations; but where a tunnel or haulageway has actually been constructed and the track laid for such a considerable length of time that the passageway, with its equipment, has become a part of the regular and established plan of the mine, and the owner or operator, through the superintendent, has knowledge of the conditions, when such conditions are more hazardous than the surroundings require, even though they do not present an immediate danger, if it reasonably can be foreseen that in the operation of the mine they are such as may well result in injuries to miners, then it is the duty of the owner or operator to have them changed and made more safe, and the failure so to do is negligence that will give rise to a liability on the part of the operator.

Watson *v.* Monongahela River Consolidated Coal & Coke Co. (Pennsylvania), 93 Atlantic, 625, p. 627, January, 1915.

DUTY TO MAINTAIN PASSAGEWAYS.

The act of 1891 of Pennsylvania provides that all passageways in mines shall be made of sufficient width to permit persons to pass moving cars in safety, and provides that mine owners shall place the underground workings, and all that is related to the same, under the charge and daily supervision of a competent person who shall be called "mine foreman;" and the statute defines "workings" as embracing all the excavated parts of a mine, which necessarily includes passageways. The act of 1893 contains provisions concerning the mine foreman and his duties which indicate that passageways are under his general control, and this statute fixes him with certain express duties in connection therewith; but there is nothing aside from the part of the act which deals with the width of entries at places where spragging is necessary and also providing that where there is a space 4 feet between the car and rib, it shall be sufficient for shelter; but these do not show a legislative intent to prescribe a statutory width for passageways and accordingly in bituminous mines the common-law obligation is upon the owner or operator to have a proper width in all established passageways, according to the necessities of each particular place, and this obligation is to the same extent as though the duty had been expressed in the act of 1893 as in the act of 1891.

Watson *v.* Monongahela River Consolidated Coal & Coke Co. (Pennsylvania), 93 Atlantic, 625, p. 627, January, 1915.

DUTY TO MAINTAIN SAFE PLACE—EXCEPTION.

The rule that an employer must exercise reasonable care to furnish his employees a reasonably safe place in which to work does not apply to the operator of a quarry and does not render him liable for negligence in failing to exercise such care where the very work which the employee is employed in doing is of such a nature that its progress constantly produces changes in the conditions and surroundings, and consequently the hazards arising therefrom, to which the employee is exposed, are regarded as the ordinary dangers of his employment and as such assumed by him.

Losasso *v.* Jones Brothers' Co. (Vermont), 93 Atlantic, 266, p. 269, February, 1915.

INSPECTION AND VENTILATION—QUESTION OF FACT.

Section 4986, General Statutes of Kansas, 1909, requires all mines generating fire damp to be kept free from standing gas and that every working place shall be carefully examined every morning with a safety lamp by a competent person before any miner is allowed to enter therein. Section 5005, General Statutes of Kansas, 1909, makes similar requirements and provides also that the hydrogen or fire damp generated in working places must be diluted and rendered harmless before miners are permitted to enter such places with a naked light. The manifest object of these sections was to prohibit miners from injuries as well as from fatalities, and it is a well-recognized fact that while mines containing "horsebacks" often manifest the presence of gas in a comparatively slight degree, nevertheless in other instances gas is present in such amounts that ignition would mean serious injury, and in such cases it is a question of fact to be determined by the jury as to whether or not a mine operator knows that the mine is generating fire damp or has been generating it in such quantities as to make a reasonable person know that it was doing so.

Ward *v.* Mackie Fuel Co. (Kansas), 146 Pacific, 1138, March, 1915.

DUTIES IMPOSED ON MINER.

REQUEST FOR PROPS—MAKING WORKING PLACE SAFE.

Section 2489–16a of the Code Supplement of 1913 of Iowa imposes upon each miner in a mine the duty to examine his working place and prohibits him from commencing to mine or load coal or other material until such place is made safe, and requires each miner to securely prop and timber the roof of his working place and requires him to prop or timber any draw slate or other like material before working under the same and imposes upon him the duty of making a request on the operator for suitable timbers and props; and these

duties are continuing duties and rest upon the miner regardless of whether the operator has supplied him with suitable props or not, and he must not permit his attention to be diverted to any other work until he has made the examination and inspection required; and he is positively forbidden to commence to mine or load coal until his working place is made safe; but this statute does not make the miner an insurer of the safety of the mine, regardless of any breach of duty on the part of the operator. The term "safe," as used with reference to the miner's working place, is necessarily a relative one, and by its very meaning involves degrees, and the miner is not required to keep out of his room because it is not propped, but he is required to inspect it promptly and diligently and to discover its dangers to the extent that diligence will discover the same; and in the performance of this duty he is necessarily exposed to danger and if he discovers any indications of its condition which a reasonably prudent man would not regard as safe, then his working place is not safe within the meaning of the statute; but the danger in such case may be potential only and in the judgment of the miner should be propped up before it becomes imminent, and the failure of the miner to prop the place of work, where the danger is not imminent, will be excused where the operator fails to furnish the props and timbers when requested where it may have been beyond the range of ordinary diligence, skill, and experience to have discovered the danger.

Edgren *v.* Scandia Coal. Co. (Iowa), 151 Northwestern, 519, p. 521, March, 1915.

KEEPING WORKING PLACE SAFE.

Where the condition in a mine, from which the injury to a miner suing for damages is alleged to have resulted, was the immediate product of the progress of the work in which the miner was properly engaged, such condition could not have been a defect within subdivision 1 of section 3910 of the statute of Alabama.

Sloss-Sheffield Steel & Iron Co. *v.* Terry (Alabama), 67 Southern, 678, p. 680, December, 1914.

OPERATOR'S FAILURE TO COMPLY WITH STATUTORY REGULATIONS.

PROXIMATE CAUSE OF INJURY.

A violation of the statute of Colorado by a coal company in failing to equip its mine with a speaking tube or telephone connection as required by the statute, does not constitute actionable negligence and render it liable for the death of a miner, where the failure to so equip the mine with speaking tubes or telephones in no way contributed and was not the proximate cause of the miner's death.

Colorado Capitol Coal Mining Co. *v.* Chatfield (Colorado), 143 Pacific 1095, p. 1096.

LIABILITY OF OPERATOR—PLEADING.

A complaint in an action by an injured miner under the statute of Alabama is sufficient where in the usual terms it avers the miner's injuries and damages to have been proximately caused by reason of the negligence of a superintendent or superior in the service and employment of the operator, to whose orders or directions the injured miner was bound to conform and did conform, which negligence consisted in this, that the said superintendent or superior negligently allowed the work of the injured miner to be performed in a manner dangerous to the safety of the miner and negligently ordered the miner to place a plank or piece of timber upon which steam shovels or wheels were to run, and in conforming to the order a wall of ore and clay near which the miner was engaged in the performance of his duty at the time of the injury was insecure and unsafe, so that a large embankment therefrom fell upon the miner, injuring him.

Sloss-Sheffield Steel & Iron Co. *v.* Terry (Alabama), 67 Southern, 678, p. 680, December, 1914.

FAILURE TO COMPLY—PROXIMATE CAUSE.

The mere noncompliance with a positive statute on the part of a mine operator or manager is not sufficient to entitle a miner to recover damages for injuries sustained, unless the noncompliance with the statute is the proximate cause of the injury, and unless a compliance with the statute would have avoided the accident and saved the miner from injury.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 911, December, 1914.

OPERATOR'S DISREGARD OF STATUTE.

A miner by using the means provided by a mine operator or manager is not guilty of contributory negligence, and mere contributory negligence in this respect on the part of the miner will not defeat a right of recovery where he is injured by the willful disregard of a positive statute, either by an act of omission or commission on the part of the mine operator or manager.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 910, December, 1914.

FAILURE TO GUARD MACHINERY—PROXIMATE CAUSE.

A coal-mining plant is an establishment within the meaning of the statute of West Virginia requiring operators in manufacturing, mechanical, and other establishments where machinery, belting, shafting, gearing, drums, and elevators are so arranged and placed as to be dangerous to persons employed, to safely and securely guard such machinery when possible, and if not possible, then notice of the danger must be conspicuously posted. This statute was intended to

guard against injuries to employees by coming in direct contact with machinery, belting, shafting, gearing, drums, and elevators in the establishment, but does not apply to injuries arising indirectly from any such conditions; and a miner injured by material falling down the shaft of a mine can not recover as for an alleged violation of this statute on the ground that the cage used in lowering and hoisting materials in the mine was not properly secured, as the statute does not provide that mine hoists or elevators shall be guarded when carrying coal and other materials to keep them from falling inside the shaft; and if there is a liability on the part of the mine operator for negligence it must be enforced under common-law rules and not under this statute.

Ferguson *v.* Middle States Coal & Coke Co. (West Virginia), 84 Southeastern, 573, p. 574, February, 1915.

FAILURE TO COVER CAGE—APPLICATION OF STATUTE.

Proof that a mining company owning coal lands caused two shafts some 200 feet apart to be sunk to and through the vein of coal to a depth of about 540 feet and thereafter employed underground a force of more than 20 miners, causing entries to be driven in every direction, constructing roadways and air courses, all such air courses and entries being of a length of more than 2,000 feet, laying tracks and switches, mining and taking out about 2,000 tons of coal, is sufficient to show a mine and to bring the plant and mine within the operation of the Illinois mines and miners act and to render the operator liable for the death of a miner caused by falling material because of the failure of the operator to equip the cage as required by the statute with a proper and sufficient covering to protect miners riding thereon.

Hakanson *v.* La Salle County Carbon Coal Co. (Illinois), 106 Northeastern, 617, p. 618, October, 1914.

FAILURE TO USE CAGE IN SHAFT—VIOLATION OF STATUTE.

Section 6799, Revised Laws of Nevada, makes it unlawful for any person or corporation to sink or work through any vertical shaft at a greater depth than 350 feet unless the shaft shall be provided with an iron-bonneted safety cage to be used in lowering and hoisting miners, and the statute is not complied with by simply having such a cage upon the mining premises but not in actual use; and aside from this, the statute makes it unlawful to sink or work through any vertical shaft at a greater depth than 350 feet, unless in the lowering and hoisting of the miners, in conducting such work or such sinking, the shaft be provided with an iron-bonneted safety cage. A bucket and crosshead used in a vertical shaft in a mine at a greater depth than 350 feet is not a compliance with the act.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 909, December, 1914.

FAILURE TO USE SAFETY CAGE—DEFENSE.

The statute of Nevada requires a coal-mine operator working through any vertical shaft at a greater depth than 350 feet to use an iron-bonneted safety cage in lowering and hoisting miners, and it is no defense in an action for the violation of the statute to say that the miners failed to demand such a compliance to be used in lowering and hoisting them through the shaft, as the statute was not enacted with its primal object, that of punishment for its violation, but the penalty imposed for its violation was rather prescribed as a reminder that the law is a police regulation, enacted for the purpose of minimizing accidents which entail suffering, privation, and death on those who may be the unfortunate victims.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 909, December, 1914.

FAILURE TO WET COAL DUST—EXPLOSION.

An action for damages for the death of a miner caused by a violation of section 4380, Compiled Laws of Oklahoma (1909), was prosecuted upon the theory that the coal operator had violated the statute in negligently permitting coal dust to mingle with and clog the air in the mine, and that a windy shot coming in contact with such coal dust ignited it, causing the explosion that resulted in the death of the miner; and the action was defended upon the theory that the operator had complied with the law in wetting the accumulated coal dust, but the explosion was caused by a "windy shot" igniting the coal dust produced and suspended in the air by a "follow shot." A verdict and judgment for the plaintiff in such action can not be disturbed on appeal where the evidence reasonably tended to establish that at the time of the explosion the coal operator had violated the statute in the particular alleged, and where the evidence also was sufficient to show causal connection between the violation of the statute and the death of the miner.

San Bois Coal Co. *v.* Resetz (Oklahoma), 143 Pacific, 46, p. 48.

FAILURE TO VENTILATE MINE—QUESTION OF FACT.

The Pennsylvania mining law of 1891 requires the owner or operator of every mine to maintain an adequate supply of pure air for the same and to conduct the ventilating currents along the face of every working place in quantities sufficient to render harmless noxious or dangerous gases; to close with suitable material all crosscuts when necessary to close them permanently; to have automatically-closing doors; to use every precaution to insure the safety of the miners; and to use no light or fire therein except safety lamps where there is likely to be an accumulation of explosive gas, and makes the owner or oper-

ator liable for an injury occasioned by any violation of the act; and the fact that a miner testified that upon lighting a squib to fire a blast he was knocked down by an explosion of gas was not so incredible, nor was the cause of the explosion so disconnected with the employer's failure to ventilate the mine, as required by the above statute, as to justify a direction of a verdict by the court; but under such circumstances the question of the failure to properly ventilate the mine, as well as the cause of the explosion, should be submitted to the jury.

Delaware, etc., R. Co. *v.* Yurkonis, 220 Fed., 429, p. 433, January, 1915.

USING BETTER APPLIANCE THAN STATUTORY REGULATIONS.

Failure to use a statutory device or implement or appliance in the operation of a mine might not be a violation of the statute requiring the use of a particular device or appliance if the mine operator uses a device or appliance generally and customarily regarded as being better or more liable to insure safety than that provided by the statute.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 910, December, 1914.

VIOLATION OF STATUTE AS EVIDENCE OF NEGLIGENCE.

Whenever an act is enjoined or prohibited by statute and the violation of the statute is made a misdemeanor, any injury to the person of another caused by such violation is the subject of an action for the recovery of damages, and the violation of the statute is the basis of the right to recover and constitutes negligence per se.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 910, December, 1914.

IGNORANCE AND INADVERTENCE NO DEFENSE.

An inadvertent or ignorant failure to comply with the provisions of a statute in the operation of a mine is the same as an intentional evasion thereof, and neither can be proved as a defense in the prosecution for a violation of such statute.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 910, December, 1914.

LIABILITY FOR NONCOMPLIANCE.

Any conscious omission or failure of a mine operator to comply with a statute which requires that he furnish certain reasonable appliances for the protection of life and limb of the miners employed by him renders him liable for ensuing injuries.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 911.

FAILURE TO FURNISH PROPS—PROXIMATE CAUSE OF INJURY.

Section 2489–5a of the Code Supplement of 1913 of Iowa requires the owner or operator of a mine to keep a sufficient supply of caps and timbers to be used as props convenient and ready for use, and requires them to be sent in and delivered to the places where needed on request; and this statutory duty imposed upon the operator is predicated primarily upon the potential danger of an unpropped roof, a danger not necessarily imminent; but the operator is charged with the knowledge that the potential danger of an unpropped roof may become the imminent danger at any moment, and may occur in a way against which the reasonable diligence of the miner can not provide without props, and in a way to prevent discovery even by the reasonable diligence of the miner; and for a court to hold that a failure of an operator to comply with this provision of the statute is too remote to be the proximate cause of an ultimate injury of a miner would be to destroy the manifest purpose of the statute; and the violation of the statute at this point by the operator may be regarded as an obstacle in the way of propping the mine, and the failure of the miner to prop in such case should be deemed the failure of the operator, and hence if the failure to prop the mine is the proximate cause of an accident, then the negligence of the operator could be such proximate cause.

Edgren *v.* Scandia Coal Co. (Iowa), 151 Northwestern, 519, p. 521–523, March, 1915.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

WHAT CONSTITUTES CONTRIBUTORY NEGLIGENCE.

The failure of a mine operator to perform the statutory duty causes the liability for all consequences to fall upon him, unless a miner, complaining of an injury from such failure, could see or know by ordinary care that the situation was imminently dangerous, and in such case there is no assumption of risk by the miner where the operator neglects a statutory duty, though the miner may still be guilty of contributory negligence such as will defeat a recovery; but in order to constitute contributory negligence there must be some act or failure on the part of the miner, in addition to the ordinary risks imposed by the character of his work under the conditions created by the operator's conduct, which would amount to culpable negligence on the miner's part, examples of which may be found in his failure to look, to observe, to test in some way the safety of the roof, or if it is unsafe and obviously so, and the danger thereby imminent, his continuing to work under such conditions.

Log Mountain Coal Co. *v.* Crunkleton (Kentucky), 169 Southwestern, 692, p. 694, October, 1914.
Jellico Coal Mining Co. *v.* Walls (Kentucky), 170 Southwestern, 19, p. 20.

FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

A miner is not guilty of contributory negligence in working in an entry, although known to him to be defectively propped; nor by such working does he assume the additional risk of such defect, unless either it was his duty to remedy the defect, or unless in the course of the work he was to do, further propping was made, necessary, which it was his duty to do, and he negligently failed to do such further propping, and such negligent failure either solely caused the injury or contributed with such defect in producing it.

Lookout Fuel Co. *v.* Phillips (Alabama), 66 Southern, 946, p. 949, November, 1914.

DEFENSE OF CONTRIBUTORY NEGLIGENCE ABROGATED—PLEADING.

A complaint in an action by a miner for damages for injuries predicated on subdivision 1 of the employers' liability statute of Alabama (code section 3910) averred that the miner while in the service and employment of the defendant operator as a coal miner in one of its mines was injured by a fall of stone or slate from the roof or top of the entry in which he was at the time engaged in work under his employment, and that the injury so received was the proximate consequence of a defect in the condition of the ways, works, machinery, or plant of the operator in that the roof or top of the entry was not properly or sufficiently propped to prevent the stone or slate from falling, and that such defective condition of the roof had not been discovered or remedied owing to the negligence of the operator or of a person intrusted by it with the duty of seeing that the ways, works, machinery, or plant were in proper condition. An answer to such complaint filed by the operator is insufficient where it avers that the plaintiff was guilty of negligence which proximately contributed to his injury in that the roof of the entry was in a defective condition, the slate and other materials composing the roof of the entry being loose and liable to fall; that this defective condition of the roof existed at the place at which the miner was working at the time of his injury; that the miner knew of such defective condition of the roof and knew the danger of working beneath the same at the place at which he was working at the time of receiving the injury; but that notwithstanding this injury, the miner negligently worked in said entry beneath said defective roof, which negligence proximately contributed to his said injury, for the reason that the statute (section 3910) provides that in no event shall it be contributory negligence or assumption of risk on the part of the miner to remain in the employment of an operator after knowledge of the defect or negligence causing the injury, unless he be a miner whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of.

Lookout Fuel Co. *v.* Phillips (Alabama), 66 Southern, 946, p. 947, November, 1914.
Burnwell Coal Co. *v.* Setzer (Alabama), 67 Southern, 604, p. 606, December, 1914.

APPLICATION OF COMMON-LAW RULES.

In an action by a miner for personal injuries because of the failure of the mine owner to furnish props as required by the statute of Missouri, a court can not apply the rules of contributory negligence or assumption of risk with the same strictness as in actions for common-law negligence as these would in effect nullify the statute; and unless, therefore, the danger was so apparent and imminent that the miner placing himself therein would amount to self-inflicted injury, he should not be denied recovery merely on a showing that there was some risk attending the further prosecution of the work and that he assumed such risk.

Runyan *v.* Marceline Coal & Mining Co. (Missouri Appeals), 172 Southwestern, 1165, p. 1167.

EFFECT OF AMENDMENT ON CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

The only effect of the amendment of 1907 to subdivision 1 of section 3910 of the liability act of Alabama, was to remove as a basis of assumption of risk and of contributory negligence on the part of a miner in respect of a defective condition within the purview of such subdivision, the remaining in service after knowledge by the miner injured in consequence of the defect in the condition to which the complaint attributed the injury for proximate cause, of the defect in the condition of the ways, works, machinery, or plant of the operator, except in cases where the miner injured was under the duty to remedy the defect causing the injury, or where the miner injured committed the negligent act causing the injury complained of. There is no general legislative purpose expressed, or necessarily impliable, to deny the existence or the defensive effect of contributory negligence or assumption of risk in all cases.

Burnwell Coal Co. *v.* Setzer (Alabama), 67 Southern, 604, p. 606, December, 1914.

SUFFICIENCY OF ANSWER.

In an action for damages by an injured miner against a mine operator, under the statute of Alabama, an answer is insufficient if it fails to allege or show either that it was the duty of the injured miner to remedy the alleged defect causing the injury, or that the miner committed a negligent act which caused the injury complained of, or which contributed with the alleged defect in causing it, and more especially where the answer fails to show that the miner had knowledge of the alleged defect in time to avoid the injury.

Lookout Fuel Co. *v.* Phillips (Alabama), 66 Southern, 946, p. 947, November, 1914.

REQUEST FOR PROPS NOT EVIDENCE OF KNOWLEDGE OF DANGER.

Under the statute of Iowa, section 2489–5a, 16a, Code Supplement of 1913, it is made the duty of a mine operator to furnish props and timbers on request of the miner and it is made the duty of the miner to prop his working place and make the same safe; but the fact that a miner ordered props is not to be considered as evidence of knowledge of imminent or impending danger, as such a construction of the statute would mean that a miner could not work after ordering props until the props were actually received; but the miner is expected to foresee his needs to some extent and make his request so that the operator may have reasonable time to comply; and the statute implies that the roof of a mine may present latent and potential dangers at all times, though such dangers are not imminent or impending, and a miner is not to be charged with contributory negligence where after making a request for props he continues to work in his place, if by the inspection required by the statute his place is not so imminently dangerous as would deter a prudent man from working in such a place.

Edgren *v.* Scandia Coal Co. (Iowa), 151 Northwestern, 519, p. 522, March, 1915.

DUTY TO EXAMINE WORKING PLACE—DEFENSE.

In an action for the death of a miner caused by a portion of the roof of a mine falling upon him, an answer which avers that the intestate was guilty of negligence which proximately contributed to his death, in that he did not examine his working place under the rock or place that fell before commencing to work thereunder, which proximately caused his death; and averring that it was the duty of such intestate, before commencing work, to examine his working place, and his alleged death was the proximate result of his failure to perform such duty, is insufficient for failing to aver that an examination of the roof would have disclosed the defect, as well as the danger of going to work at the particular place, and for the additional reason that the averment of the failure of the deceased to examine the working place under the roof before commencing to work proximately caused his injury, is but a conclusion of the pleader.

Henderson *v.* Tennessee Coal, Iron & Railroad Co. (Alabama), 67 Southern, 414, p. 415, December, 1914.

VENTILATION OF MINE—FAILURE OF MINER TO OBEY INSTRUCTIONS.

A miner can not recover from a mine operator for injuries caused from the presence of poisonous gas in the mine, due to the negligence of the operator in failing to ventilate the mine, as required by the statute of Missouri, where the lack of proper ventilation was due to the failure of the operator to make an opening between two rooms of

the mine, where it appeared that the miner himself and his two sons were the only persons authorized to work in the particular room and where the miner had been directed by the mine operator to put in the cross cut in order to give the required ventilation of the mine.

Perry *v.* Northwestern Coal & Mining Co. (Missouri Appeals), 175 Southwestern, 140, p. 141, April, 1915.

EFFECT ON ASSUMPTION OF RISK.

OPERATOR'S BREACH OF STATUTORY DUTY—ASSUMPTION OF RISK.

Risks assumed by a miner are only such as arise after the mine operator has discharged his statutory duty.

Log Mountain Coal Co. *v.* Crunkleton (Kentucky), 169 Southwestern, 692, p. 694, October, 1914.

EFFECT ON ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE.

The coal-mining statute of Colorado was drawn with the sole purpose to insure safety in the method and manner of mining and was intended to cure the rigors of the common-law rule as applied to assumption of risk and contributory negligence, and courts can not be less liberal in the interpretation of such statutes than the spirit of the law demands; and under the statute a miner is not to be charged with assumption of risk or be held guilty of contributory negligence in removing coal from one side of a section to another so as to leave no natural support across the (wall) face of the roof, nor through the fact that the chutes to one side of the section had caved in.

Lindquist *v.* Pacific Coast Coal Co. (Washington), 142 Pacific, 445, p. 448.

MINER CAN NOT WAIVE VIOLATION OF STATUTE.

In an action for damages for the death of a miner due to the alleged violation of the statute of Oklahoma on the part of the mine operator, the servant as a matter of law can not waive a compliance by the operator therewith and assume the risk of the operator's negligence in failing to comply with the statute, as to permit mine operators to avail themselves of such assumption of risk by their miners would be in effect to enable them to nullify a penal statute.

Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30.
Great Western Coal & Coke Co. *v.* McMahan (Oklahoma), 143 Pacific, 23.
Great Western Coal & Coke Co. *v.* Cunningham (Oklahoma), 143 Pacific, 26.

VIOLATION OF STATUTE AS TO SAFETY APPLIANCES.

A miner injured while being carried down a shaft can not be charged with an assumption of risk where the mine operator violates a positive statute in not furnishing an iron-bonneted safety cage for lowering and hoisting miners.

Ryan *v.* Manhattan Big Four Mining Co. (Nevada), 145 Pacific, 907, p. 910, December, 1914.

ASSUMPTION OF RISK NOT A DEFENSE.

In an action for damages for the death of a miner the only question in issue under the statute of Oklahoma is whether or not the statute has been violated, and if so whether such violation was the proximate cause of the death, and it is immaterial whether the court gave conflicting or erroneous instructions upon the doctrine of assumption of risk, as the defense of assumption of risk is not available under the statute.

Great Western Coal & Coke Co. *v.* Cunningham (Oklahoma), 143 Pacific, 26, p. 28.
Great Western Coal & Coke Co. *v.* McMahan (Oklahoma), 143 Pacific, 23.
Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30.

In an action for the death of a miner caused by a fall of rock from the roof of the chamber or station where he was working, the mine operator can not, under the employers' liability act of California, set up the defense of assumption of risk by the miner for the purpose of defeating a recovery.

Crabbe *v.* Mammoth Channel Gold Mining Co. (California), 143 Pacific, 714, p. 715.

FAILURE TO VENTILATE MINE—INJURY TO HEALTH.

In a mine insufficiently ventilated and in which dynamite and powder are used for shooting purposes, carbon dioxide or black damp, and carbon monoxide or white damp, may be generated. The former is commonly known as carbonic acid gas and is dead air with the properties of oxygen exhausted, is nonpoisonous, but causes suffocation by excluding oxygen from the lungs, while the white damp makes a person ache, dizzy, and sick at the stomach, and has the effect of destroying the red corpuscles of blood, the oxygen-carrying property of the blood; and if a person is deprived of a sufficient quantity of oxygen it results in a worn-down, debilitated, and weakened condition of the system; and where a miner who has been working in a mine is found to be in such condition because of the alleged negligence of the mine operator, in failing to ventilate the mine in accordance with the statute, the question of the operator's negligence in this respect is properly submitted to a jury for a determination and the plea of the assumption of risk on the part of the miner by continuing to work in the mine with a knowledge of the effect of the air upon his system, can not be interposed in an action based on the operator's failure to perform the statutory duty as to ventilation.

Log Mountain Coal Co. *v.* Crunkleton (Kentucky), 169 Southwestern, 692, p. 694, October, 1914.
Jellico Coal Mining Co. *v.* Walls (Kentucky), 170 Southwestern, 19, p. 20, November, 1914.
See Perry *v.* Northwestern Coal & Mining Co. (Missouri Appeals), 175 Southwestern, 140, April, 1915.

RISK OF OPERATOR'S VIOLATION OF STATUTE NOT ASSUMED.

A miner working under a contract whereby he was to receive 45 cents per ton for coal mined and loaded, was to be furnished all necessary props, caps, and headers, and was himself to set the props, caps, and headers as needed and take care of all slate, wherever he might find the slate in such condition as to make it unsafe to leave it, then he should take it down, and where slate examined by him seemed to be sound, and nothing to indicate it was about to fall, or would fall before props and headers requested and promised were supplied, it was not incumbent upon the miner to take it down, and it can not be said that either under his contract or the statute he assumed the risk of its falling before the props and headers were furnished.

Big Branch Coal Co. *v.* Wrenchie (Kentucky), 170 Southwestern, 14, p. 16, November, 1914.

DUTY TO PROP ROOF OF ENTRY.

The statutes of Alabama on the subject of mining indicate a public policy to the effect that mine owners and operators shall be charged with the duty of making their mines reasonably safe for miners; and these statutes require miners themselves in certain cases to look out for their own safety, as in propping the roofs of rooms in which they work, but impose on the operator the duty of furnishing the timbers for such propping; but the statutes do not require miners to prop or look after the safety of entries, and that duty therefore rests on the owners or operators of the mines. Section 1021 of the code requires owners and operators of mines to keep a sufficient supply of props or other timbers used in the mine so that the miners may at all times be able to prop their working places, and the mine owner or operator shall afford miners the proper facilities for the delivery of props and other timbers needed by them in their respective working places. But the duty to prop an entry may rest on the miner himself, when he is employed to do that particular work or is employed to make the entry itself and to prop it as the work progresses, or where he engages in work in the entry, after it is made and properly propped, which is of such a character as to render further propping necessary; and in all such cases the miner assumes the risk of his negligent failure to do the necessary propping, and if injured as the result of such failure he can not recover from the operator.

Lookout Fuel Co. *v.* Phillips (Alabama), 66 Southern, 946, p. 948, November, 1914.

REQUEST FOR PROPS—FAILURE TO FURNISH—CONTINUING WORK.

Section 4999–3a, Code Supplement of 1913, of Iowa, provides that where the property, works, machinery, or appliance of an employer are defective or out of repair, and where it is the duty of an employer

to furnish reasonably safe machinery, appliances, and place to work, an employee shall not be deemed to have assumed the risk by continuing in the prosecution of the work growing out of any such defects, unless the danger is imminent and to such an extent that a reasonably prudent person would not continue in the prosecution of the work and it is the purpose of this statute to prevent an employer or a mine operator from laying upon his employee or miner the consequences of his own failure simply because such failure was known to the employee or miner, and under this statute a miner will not be held to have assumed the risk though he continues working in a mine partially unpropped, where he had made the statutory request on the operator for props and the operator had failed to comply with such request and the miner was injured because of such failure of the operator to furnish the props requested.

Edgren *v.* Scandia Coal Co. (Iowa) 151 Northwestern, 521, p. 523, March, 1915.

NEGLIGENCE OF MINE SUPERINTENDENT.

PROOF OF NEGLIGENCE OF SUPERINTENDENT—PROXIMATE CAUSE.

In an action against a mine operator for damages for negligence because of the negligence of the mine operator's superintendent, and in the absence of a charge of willfulness, wantonness, or intentional injury, it was not error for a court to instruct a jury to the effect that the superintendent's directions to the miner to pinch or prize the coal in the wall, and to turn the water on, are alone sufficient to justify a recovery; but the jury must further find that in giving such instructions the superintendent was at fault and that such fault was the proximate cause of the miner's injury; and that the statute of Alabama relating to liability of employers for damages when their employees are injured while engaged in the work for which they are employed, does not authorize the jury to award damages unless the operator's agent was guilty of negligence.

Barker *v.* Tennessee Coal, Iron & Railroad Co. (Alabama), 66 Southern, 600, November, 1914.

DELEGATION OF DUTY.

DUTY OF FOREMAN TO INSPECT—DELEGATION OF DUTY—NEGLIGENCE.

The statute of Oklahoma imposes upon a mine foreman or his assistant the duty of daily inspection, and he has no right to delegate this duty to the fire boss or to any other person working in the mine, other than a regular assistant; and this duty is a nondelegable one, and the failure to discharge which constitutes primary negligence on the part of the mine operator.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 603, December, 1914.

SAFE PLACE—DELEGATION OF DUTY.

The owner and operator of a mine may delegate to an electrician the duty or authority to make safe or properly protect electric wires through a passageway in his mine through which the miners were required to pass; but the mine operator can not, under his duty to furnish a safe working place, delegate such duty in such a manner as to relieve himself of liability for failure to furnish a safe working place.

Hazzard *v.* Consolidated Coal Co. (Michigan), 149 Northwestern, 991, p. 992, December, 1914.

DELEGATION OF VENTILATION OF MINE.

The statute of Missouri imposes upon a mine operator the duty of properly ventilating the mine, and a breach of such duty is negligence per se, and the operator can not delegate the performance of this duty to another and thereby shift responsibility or liability for its nonperformance; but the statute does not place upon the operator of a mine the duty of an insurer, but does impose upon him the positive duty to exercise reasonable care to provide a sufficient amount of ventilation. The rule that the responsibility of the mine operator can not be shifted does not imply that the operator must perform the task of making a safe place or providing for the ventilation for the miner with his own hands, or that he is forbidden to require a miner to keep his own place in order, though the task be within the scope of the miner's skill and experience. It is not an attempted delegation of duty, but is in fact a step in the performance thereof when a mine operator, in the exercise of his legal right to direct a miner to do any and all things within the scope of the general employment, directs him to do that which, when done, will make safe the place of the miner's employment. The fact of directing a miner to dig coal from a partition wall, to make an opening therein for the purposes of ventilation, is not different from digging coal in any other part of a room, and the operator in ordering a miner to do such work for the purpose of securing proper ventilation, was not delegating a duty, but was requiring a service the operator had a right to demand of the miner.

Perry *v.* Northwestern Coal & Mining Co. (Missouri Appeals), 175 Southwestern, 140, p. 142, April, 1915.

NONDELEGABLE DUTIES—NEGLIGENCE.

The duty of a mine operator to exercise reasonable care and diligence to provide his miners with a reasonably safe place in which to work, having regard to the kind of work and the conditions under which it must necessarily be performed, is an absolute one, and if instead of performing this duty in person, the operator delegates it to an officer or servant, then such officer or servant stands in the

place of the operator, and the negligence of such officer or servant is the negligence of the operator himself, and any miner injured by such negligence may recover, regardless of the relation the injured miner sustained to the officer or servant whose negligence resulted in inflicting the injury.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 605, December, 1914.
Hazzard *v.* Consolidated Coal Co. (Michigan), 149 Northwestern, 991, December, 1914.

STATUTORY ACTION FOR WRONGFUL DEATH.

ACTION FOR DEATH OF MINER—STATUTE OF LIMITATIONS.

An action for the wrongful death of a miner must under the statute of Arkansas be brought within two years for the death of such miner, and the time for commencing such action is not extended by the statute authorizing a second suit within one year where a plaintiff has been nonsuited in his first action.

Western Coal & Mining Co. *v.* Hise, 216 Fed., 338.

PERSONS ENTITLED TO SUE.

The State of New York gives a right of action for wrongful death and provides for the maintenance thereof by the personal representatives of the deceased for the benefit of those entitled to recover, and an action for the death of a husband and father wrongfully killed in Pennsylvania is properly brought and maintained in New York by the administrator of the decedent; but if there is no widow or child and the father and mother survive who are entitled to the benefit of the recovery, then an action must be brought by them, and not by an administrator.

Teti *v.* Consolidated Coal Co., 217 Fed., 240, p. 450.

RIGHT OF ALIEN TO SUE.

The treaty of July 3, 1913, between the United States and Italy, giving a citizen of Italy the right to sue for wrongful death, gives an alien coming into New York and prosecuting his action for wrongful death precisely the same rights and remedies, and no more, which the State of New York accords to its own citizens.

Teti *v.* Consolidated Coal Co., 217 Fed., 443, p. 450.

PLACE OF BRINGING SUIT.

Whether an action for the wrongful death of a miner against a Maryland mining corporation operating a mine in Pennsylvania and authorized to do business in the State of New York should be brought and maintained in the courts of the latter State for a death occurring in Pennsylvania must be ruled by the procedure of New York, as the

general rule is that the procedure and remedy are regulated by the law of the forum.

Teti *v.* Consolidated Coal Co., 217 Fed., 443, p. 447.

An action against a Maryland corporation operating coal mines in Pennsylvania and authorized to transact business in New York may be maintained in either Pennsylvania, Maryland, or New York, under the statute authorizing transitory actions to be brought wherever a defendant is found.

Teti *v.* Consolidated Coal Co., 217 Fed., 443, p. 447.
See Lehigh Valley Coal Co. *v.* Yensavage, 218 Fed., 547.

LINEAL HEIRS—FATHER AND MOTHER.

The statute of Colorado does not exclude the father and mother from the term "lineal heirs" as a lineal heir is one who inherits in a line either ascending or descending from the common source as distinguished from a collateral heir.

Rocky Mountain Fuel Co. *v.* Kovaics (Colorado), 144 Pacific, 863, p. 865, December, 1914.

RIGHT OF FATHER OR MOTHER TO SUE.

Section 649 of the Revised Statutes of 1908 (Colorado), known as the coal-mining act, provides that a right of action shall accrue to the widow and lineal heirs of a person whose life shall be lost, and in an action for the death of a miner this statute can not be held to mean child or children only, but when construed in connection with the Colorado statutes of descent, includes the father and mother, as under the statutes of descent the father and mother inherit from a child and are specifically authorized to sue for the death of a child, and by the insertion of the word "lineal" before the word "heirs" in the coal-mining act, the legislature intended to exclude collateral heirs only, and to limit the right of action to those who were entitled to receive the benefits of the person killed, while he lived, and to enable them to recover damages for the loss of such benefits in the case of his death, and to exclude the father and mother would deprive them of a right under the coal-mining act, to which they are entitled under other statutes of Colorado.

Rocky Mountain Fuel Co. *v.* Kovaics (Colorado), 144 Pacific, 863, p. 865, December, 1914.

VIOLATION OF STATUTORY DUTY—STATUTORY REMEDY.

An action for the death of a miner caused by the alleged breach of the statutory duty on the part of the coal operator to furnish props, must be brought under the coal-mining act, as this is the only act that specifically gives the right of action for negligence in failing to furnish props.

Rocky Mountain Fuel Co. *v.* Kovaics (Colorado), 144 Pacific, 863, p. 866, December, 1914.

INJURY FROM FAILURE TO PROVIDE SAFE WORKING PLACE.

A complaint in an action by an injured miner under the statute of Alabama is sufficient where, in the usual terms, following the statute, it ascribes the injury to the defect in the ways, works, machinery, or plant of the operator, and avers that the defect consisted in this, that a wall of ore and clay, near which the miner was engaged in the performance of his duty at the time he received the injury, was unsafe and insecure, so that a large embankment therefrom fell upon the miner and caused the injury complained of.

Sloss-Sheffield Steel & Iron Co. *v.* Terry (Alabama), 67 Southern, 678, p. 680, December, 1914.

ACTION BY PARENT FOR DEATH OF CHILD—PLEADING AND PROOF.

The statute of Missouri gives the parents the right to sue for the wrongful death of a child; and in an action by a father and mother for the death of a child they recover in tort on the right which the child would have had if he had survived the injury, and which right died with the injured child at common law but has been by the statute expressly transmitted to the parents; and in such case it is not necessary to aver or prove the amount of damages, but the jury must make their estimate of damages from the facts proved, and they exercise their own judgment upon such facts by connecting them with their own knowledge and experience which they are supposed to possess in common with the generality of mankind.

Dalton *v.* St. Louis Smelting & Refining Co. (Missouri Appeals), 174 Southwestern, 468, p. 470, March, 1915.

PROOF OF INDIGENT CONDITION OF BENEFICIARY.

The statute of California, section 1970, Civil Code, gives the right of action to a personal representative of a person killed by the wrongful act of another and provides for the recovery of damages for the benefit of the widow, children, dependent parents, and dependent brothers and sisters; and in an action for the wrongful death of a miner against a mine operator for the benefit of the father of the deceased, evidence of the financial condition of the father is admissible, and the word "dependent" as used in the statute was intended to describe a condition of actual dependency, and not a dependency that rested on a presumption on account of relationship, and it was necessary for the plaintiff to prove, not a mere relation of dependency, but actual dependency.

Balakalala Consolidated Copper Co. *v.* Reardon, 220 Fed., 584, p. 588, February, 1915.

Paskvan *v.* Allouez Mining Co. (Michigan), 152 Northwestern, 82, p. 84, April, 1915.

SUFFICIENCY OF ANSWER.

Where a complaint, in an action for the death of a licensee while in the mine of the defendant operator and at its invitation and request, alleges that the licensee was killed by a portion of the roof of the mine falling upon him, and that his death was proximately caused by the negligence of the operator's servants while acting within the line and scope of their employment, and that they negligently caused a portion of the said roof to fall upon the intestate, an answer which avers that the intestate knew of the defect or negligence which caused his death, and failed within a reasonable time, to give information thereof to the operator or to some person superior to such intestate engaged in the service or employment of the defendant, is insufficient for failure to aver that the intestate was charged with the duty of informing the operator of the alleged dangerous condition of the roof.

Henderson *v.* Tennessee Coal, Iron & Railroad Co. (Alabama), 67 Southern, 414, p. 415, December, 1914.

MINES AND MINING OPERATIONS.

NEGLIGENCE OF OPERATOR.

DEFINITION OF NEGLIGENCE.

Negligence in a legal sense is a failure on the part of a mine operator to observe for the protection of the interests of the miner that degree of care, precaution, and vigilance which the circumstances justly demand, whereby the miner suffers injury.

Darby Coal Mining Co. *v.* Shoop (Virginia), 83 Southeastern, 412, p. 416, November, 1914.

NEGLIGENCE OF OPERATOR AND THIRD PERSON—EFFECT.

Where an injury is sustained by a miner as the result of the operator's negligence in failing to provide him with a reasonably safe place to work, or reasonably safe machinery or tools with which to perform his work, although such negligence would not have caused the injury complained of, but for the intervening negligent act of another miner in the same field of service with the injured miner, the fellow servant doctrine can not be invoked by the operator to escape liability for the injury, as in such case the negligence of the fellow servant will be treated as combining with that of the master in causing the injury, or he will be regarded as the vice principal of the operator and his negligence imputed to the operator, and in either case the primary negligence of the operator will be regarded as the proximate cause of the injury.

Fluhart Collieries Co. *v.* Meets (Kentucky), 169 Southwestern, 686, p. 687, October, 1914.

DEGREE OF CARE REQUIRED—LIABILITY.

A person guilty of negligence or an omission of duty should be held responsible for all the consequences which a prudent and experienced man fully acquainted with all the circumstances which in fact exist, whether they could have been ascertained by reasonable diligence or not, or would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind.

Producers' Oil Co. *v.* Eaton (Oklahoma), 143 Pacific, 9, p. 10.

DEGREE OF CARE—DANGERS NOT ANTICIPATED.

The operator of a mine is not to be charged with negligence because he worked it on the pillar system, supporting the roof with props, where a sufficient supply of timber was furnished at the entrance of the working place; and an operator can not be held liable for the death of a miner resulting by the fall of a portion of the roof due to a "squeeze" because he failed to provide for cribbing instead of props, and especially where the mine was not one that is called an unsafe mine; and the fact that the proof showed that the accident would not have happened if cribbing had been used is not of controlling influence, as such testimony is given in the light of what has occurred and is of little value in determing whether, when considering the character of the working place and the past history of the mine, the "squeeze" should have been anticipated and guarded against by cribbing instead of props.

Lindquist *v.* Pacific Coast Coal Co. (Washington), 142 Pacific, 445, p. 447.

PROXIMATE CAUSE OF INJURY.

A charge of negligence in an action by an injured miner against a mine operator in failing to furnish a linchpin, and by reason of which the wheel of a coal car came off and the miner was injured while reaching for the wheel inside of the shaft, is not supported by proof that the miner while reaching inside of the shaft for the car wheel which had come off of the car because there was no linchpin and was while projecting his head and body inside of the shaft struck on the head by falling material, the cause of the falling material being unknown, there being no causal connection between the alleged negligence on the part of the operator in failing to furnish a suitable linchpin and the falling material that actually produced the injury. The rule is that an injury for which damages are sought must be the natural and probable consequence of the negligence charged and must be of such a character as an ordinarily prudent person ought to have foreseen, and might probably occur as a result of the alleged negligence.

Jenkins *v.* La Salle County Carbon Coal Co. (Illinois), 106 Northeastern, 186, p. 187, October, 1914.

A coal-mining corporation is not liable for the death of a miner who, in violation of a rule of the mine, attempted to pass through a cage at the bottom of the shaft and was killed by a sudden starting of the cage, and where the rule required the miners at the bottom of the shaft to use the passageway around the cage in passing from one side of the shaft to the other; and negligence can not be imputed to the mining company because of its failure to equip its mine and shaft with a speaking tube or telephone connection, where the want of such speaking tube or telephone connection in no manner contributed to the death of the miner.

Colorado Capitol Coal Mining Co. *v.* Chatfield (Colorado), 143 Pacific, 1095, p. 1096.

PROXIMATE CAUSE OF INJURY—QUESTION OF FACT.

The question as to whether or not a negligent act involving a breach of duty on the part of an oil-drilling company to its employee is the proximate cause of an injury to such employee is one of fact for the determination of a jury, if there is any evidence whatever reasonably tending to prove the same.

Producers' Oil Co. *v.* Eaton (Oklahoma), 143 Pacific, 9, p. 11.

ACCIDENT AS PROXIMATE CAUSE OF INJURY.

A coal-mining company loading coal from its tipple into a car standing on a spur or side track is not liable for an injury to a person walking along the main track opposite the tipple at a distance of 18 feet from the side track on which the coal car was standing, where the injury was caused by a single block or lump of coal bounding over the side of the car and striking the traveler on the leg, though an employee of the coal company had stated to the traveler that it was safe to walk on the main track past the tipple and the coal car in process of loading, as in the particular case the proximate cause of the injury was a pure accident and not the result of actionable negligence on the part of the coal company.

Kirk *v.* West Virginia Colliery Co., 215 Fed., 77, p. 78.

QUESTIONS OF FACT.

The questions of the negligence of a coal company and the contributory negligence of a miner are questions to be determined by the jury where the evidence shows that the miner lost his life while engaged with other employees in making repairs upon the coal tipple, and while standing upon a platform used for making the repairs and attempting to remove an iron shaft of the tipple in order that it might be replaced by a larger shaft a plank of the platform upon which the miner was standing slipped from a girder upon which it rested, causing him to be thrown down to a coal car some

25 feet below the platform, causing his death, and where it appeared that the repairs were being made in the night and the only light was that furnished by miners' lamps in the caps of the workmen.

Interstate Coal Co. *v.* Shelton (Kentucky), 169 Southwestern, 546, October, 1914.
Darby Coal Mining Co. *v.* Shoop (Virginia), 83 Southeastern, 412, p. 415, November, 1914.

Where according to the custom of a mine it was the duty of the operator to prop the roof of a roadway, the questions of the operator's negligence in this respect and of the miner's contributory negligence are for the jury to determine and can not be passed upon by a court as a matter of law.

Stringer *v.* York (Kentucky), 170 Southwestern, 527, November, 1914.

RELATION OF MASTER AND SERVANT—MINER RIDING OUT OF MINE AFTER WORK.

A coal-mine operator can not escape liability for the death of a miner caused by a shot and a subsequent explosion of coal dust while the miner with others was being hauled out of the slope after he had ceased his work in the mine on the theory that the relation of master and servant terminated at the time the miner quit work in the mine and the relation did not exist while he was being hauled out of the slope of the mine and no duty was owing him by the operator; but as a matter of law the relation of master and servant under such circumstances continued until the miner was taken from the mine.

Great Western Coal & Coke Co. *v.* McMahan (Oklahoma), 143 Pacific, 23.
Great Western Coal & Coke Co. *v.* Cunningham (Oklahoma), 143 Pacific, 26.
Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30.
Great Western Coal & Coke Co. *v.* Boyd (Oklahoma), 143 Pacific, 36.
Great Western Coal & Coke Co. *v.* Belcher (Oklahoma), 143 Pacific, 36.
San Bois Coal Co. *v.* Resetz (Oklahoma), 143 Pacific, 46.

FAILURE TO INSPECT ROOF.

It is a matter of common knowledge where shots are fired in a mine and where the roof is of such height that miners can not ascertain for themselves whether they are working in an obviously dangerous place proper inspection should be made and trimming or brushing done from time to time as needed to make the place reasonably safe, and in case of injury to a miner by a fall of slate or rock it is fairly inferable that the negligence of the operator in failing to inspect and trim or brush the roof at reasonable intervals was the proximate cause of the injury, and the jury may fairly infer that an ordinary inspection of the roof would have revealed the loose condition of the rock in time to have prevented the injury.

Scott *v.* American Lead & Smelting Co. (Missouri Appeals), 173 Southwestern, 23, p. 26, January, 1915.

INJURIES FROM BLASTING.

A mining company in blasting rock preparing for the construction of a tipple for its mining plant is liable for damages to a child caused from the rock thrown by the blast, under the rule that where blasting operations result in a direct trespass upon the premises injured by casting soil or rock thereon, the liability of the person causing the injury is absolute, and it must respond in damages irrespective of the question of negligence or want of skill, and without regard to whether precautions are used or not to prevent the injury complained of, as the act itself is a nuisance, and this liability attached to the mining company although the house in which the parent lived and in which the child was injured belonged to the mining company.

Allegheny Coke Co. *v.* Massey (Kentucky), 174 Southwestern, 499, March, 1915.

NO LIABILITY FOR ACCIDENTAL INJURIES.

A mine operator is not liable for an injury to a miner who was sent with another miner to load a barrel of oil on a car and where the miner while in the act of jumping from the car to avoid danger was injured by a heavy plank sliding down a hillside, which had been accidentally dropped by two other miners coming to assist in loading the barrel of oil on the car and who were carrying the plank for the purpose of facilitating the loading of the barrel of oil.

Farris *v.* Cabin Creek Consolidated Coal Co., 220 Fed., 813, p. 815, February, 1915.

FAILURE TO INSPECT FOR MISSED SHOTS.

The rule that a mine operator is not required to furnish a safe place for miners, where the perils to the working place are caused by the progress of the work in which the miners are engaged, does not apply to persons engaged in drilling holes for firing shots, as such work is not work of construction or repair and in which the risks are caused by the progress of the work and are assumed by the miner; but the operator directs the drillers to work in places prepared for them as they are moved about the mine from drift to drift, and the operator has undertaken to inspect each working place before assigning the drillers to the work there; and under such circumstances an operator is liable for failure to give proper inspection to discover "missed shots," where such missed shots could have been discovered by inspection, and the operator is not relieved from the duty of inspection and of liability for failure to inspect for shots simply because drillers themselves do generally look out for missed shots.

Balakalala Consolidated Copper Co. *v.* Reardon, 220 Fed., 584, p. 589, February, 1915.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

EFFECT AND WEIGHT OF EXPERT EVIDENCE.

In an action by an injured employee for damages caused by the alleged negligence of an oil drilling company, it is error for the court to instruct the jury that no reliance is to be placed on or aid to be gained from the opinion evidence of experts; but the jury may be instructed that they may disregard such evidence if they deem it unreasonable or not entitled to belief because of other and contradicting evidence from witnesses claiming positive knowledge.

Producers' Oil Co. *v.* Eaton (Oklahoma), 143 Pacific, 9, p. 11.

PLEADING NEGLIGENCE—VARIANCE.

In an action by an injured miner for damages there can be no recovery under an allegation of the failure of the mine operator itself to prop the roof where the miner was working and of its failure to furnish the miner a reasonably safe place to work, where the evidence shows a failure on the part of the operator to furnish the miner sufficient props and caps to support the roof; and under such allegations evidence of the failure of the operator to furnish the miner props and caps to support the roof is not admissible.

Palmer *v.* Empire Coal Co. (Kentucky), 172 Southwestern, 97, p. 98, January, 1914.

INJURY FROM COAL-DUST EXPLOSION—SUFFICIENCY OF COMPLAINT.

A complaint in an action by a miner injured by a coal-dust explosion is sufficient where it sets out the several duties cast upon the mine operator by the statute of Illinois, but alleges one breach only, and that the operator willfully failed to see that a certain roadway which was so dry that the air therein was clouded with dust was thoroughly sprinkled, sprayed, or cleaned as the statute requires, whereby the explosion and consequent injury to the plaintiff followed.

Eldorado Coal & Mining Co. *v.* Mariotti, 215 Fed., 51, p. 55.

SUFFICIENCY OF COMPLAINT BY INJURED MINER.

A complaint in an action by an injured miner against a mine operator is sufficient where it charges a defect in a chain, and that it was weak and not sufficient for the purpose for which it was furnished and averring that it was too weak, and insufficient, to perform the functions for which it was furnished and that it broke while being used and by reason of which the injury occurred.

Southern Iron & Steel Co. *v.* Boston (Alabama), 66 Southern, 684, p. 685, November, 1914.

INSUFFICIENCY OF COMPLAINT BY INJURED MINER.

A complaint in an action for personal injuries for the alleged negligence of a mine operator for failure to exercise reasonable care in furnishing a miner a reasonably safe place to work, is insufficient where it does not charge any inherent defect or knowledge in the plant, ways, or works, or any other neglect by the operator in the performance or discharge of a nondelagable duty, and where the negligence ascribed was the failure to discharge, by some servant, the delegable duty of properly or sufficiently fastening a cable to the trip or chain, and where there was no charge that the cable was not adaptable to the use for which it was furnished, or that it was defective or dangerous, as from all the allegations, the works may have been perfectly safe and the cable sound and sufficient and the only negligence was the failure of a fellow servant to properly fasten the cable to the trip or chain so that it would not come loose.

Southern Iron & Steel Co. *v.* Boston (Alabama), 66 Southern, 684, p. 685, November, 1914.

INJURY TO LICENSEE—WILLFUL INJURY.

In an action by a licensee for an injury while riding on a tramcar in a mine, a complaint is insufficient which alleges that the engineer or servant of the mine operator, who was in charge and control of the engine and tramcar, wantonly, willfully, or intentionally wrecked and derailed the tramcar upon which the plaintiff was riding in the mine, and that by reason of such wanton, willful, or intentional act of the engineer the plaintiff was badly injured, but which fails to aver that the engineer knew that the plaintiff was on the car, as the averments only characterizes the act and not the injury as wanton or willful.

Woodward Iron Co. *v.* Finley (Alabama), 66 Southern, 587, November, 1914.

ALLEGATIONS AS TO SAFE PLACE.

In an action by a miner against a mine operator for damages for injuries to the miner on the ground of the alleged negligence of the mine operator, it is sufficient where it avers that the alleged negligence related to employment in operating a coal mine and the negligence of the operator to use reasonable care to provide a reasonably safe place to work; and if act of the negligence resulting in the injury was that of a fellow servant, this is a matter of defense, not requiring a negative averment in the complaint. It is also unnecessary to aver ignorance on the part of the plaintiff of the dangerous character of the appliance or want of means of ascertaining its dangerous character, as the miner in such case has the right to assume that the operator has performed his duty unless the danger be so open and apparent that the miner is bound to see and thereby assume the risk; but even in

such case no negative averment is required, as this is a matter of defense.

Yates *v.* Crozer Coal & Coke Co. (West Virginia), 84 Southeastern, 626, p. 627, March, 1915.

INJURY TO MINER—EXCLUSIVE REMEDY.

An injured miner can not in the same complaint, by different counts recover for compensation for his injury under the workman's compensation law and under another count recover damages for pain and suffering and for disfigurement of his body from the same injury and resulting from the negligence of a mine operator, as the remedy under the compensation act is exclusive.

McRoberts *v.* National Zinc Co. (Kansas), 144 Pac. 247, November, 1914.

PLEADING AFFIRMATIVE DEFENSE.

Contributory negligence in the State of California is an affirmative defense which must be pleaded and while a pleader may charge contributory negligence in general terms, yet he is required to plead the facts of such negligence and the facts pleaded must show a causal connection with the injury. Contributory negligence in law is predicated on the existence of negligence on the part of the defendant, the responsibility for which he seeks to avoid by showing a concurrent and contributing negligence upon the part of the person injured.

Crabbe *v.* Mammoth Channel Gold Mining Co. (California), 143 Pacific, 714, p. 716.

RECOVERY MUST BE BASED ON ALLEGATIONS OF THE PLEADING.

A miner suing for injuries caused by the presence of poisonous gas in his working room in the mine, caused by the alleged breach by the mine operator of the statutory duty "to provide and maintain a good and sufficient amount of ventilation," in that the mine operator negligently failed to put an opening in the partition wall between two rooms, by means of which proper ventilation might have been supplied, can not recover where it appears from the evidence that the lack of the opening referred to in the pleading did not contribute in any way whatever to the plaintiff's injuries for the reason that there was no air circulating in the entry to which the opening would have led, but the lack of ventilation was due to the fact that there had been "a short circuit" in the main air current, produced by the enlargement of a ventilating door or hole in a different part of the mine and which prevented the air from circulating in the part of the mine where the miner was engaged.

Perry *v.* Northwestern Coal & Mining Co. (Missouri Appeals), 175 Southwestern, 140, p. 143, April, 1915.

PROOF OF CUSTOM INADMISSIBLE.

Under a contract between a mine owner and a miner, by which the miner was given the exclusive right to mine all the coal in a certain defined territory but stating no time within which the coal should be mined, testimony is inadmissible for the purpose of showing a general custom or usage in the particular mining district to the effect that contracts of miners with operating companies for the mining and removing of coal were subject to termination at the will of either party, as evidence of a custom or usage is not admissible if it contradicts expressly or by implication the terms of a contract.

Pratt Consolidated Coal Co. *v.* Short (Alabama), 68 Southern, 63, p. 67, February, 1915.

REPORT OF MINE INSPECTOR AS EVIDENCE.

In an action against a mine operator for damages for the death of a motor driver or engineer, due to an alleged defect in the motor track, the district mine inspector's report is not proper evidence on the trial of the case, particularly so where the mine inspector is present in person and testified as to what he knew about the condition of the mine.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 944, April, 1915.

EVIDENCE TO CONTRADICT A MINE FOREMAN.

In an action against a mine operator for the death of a trip driver caused by an alleged defect in the motor track, causing the motor to be derailed, knocking down a prop, and causing loose rock to fall upon and kill the driver, it is proper to show by a witness, for the purpose of contradicting evidence of the mine foreman, that the mine foreman had told the witness shortly after the accident that it was caused by a bad joint in the track.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 943, April, 1915.

DUTY TO FURNISH SAFE PLACE.

DILIGENCE COMMENSURATE WITH DANGER.

It is the duty of a mine owner to exercise ordinary care to provide a reasonably safe place in which the miners may perform their work, and he must use diligence to keep the place in a reasonably safe condition, and the diligence required must be commensurate with the character of the services required and with the dangers a prudent man would comprehend under the circumstances of each particular case, and a mine owner or operator is liable for any injury resulting from a failure to exercise such care; and it is the corresponding duty of a miner employed to exercise that degree of care

which is commensurate with the character of his occupation and that which a reasonably prudent person would use under like circumstances to protect himself from injury.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 603, December, 1914.

DUTY TO FURNISH SAFE WORKING PLACE—NONDELEGABLE DUTY.

Tunnels and entries in a mine are parts of the plant that the mine owner or operator must furnish to his miners and he must make them of sufficient width and height to permit cars to enter and leave the mine and provide sufficient space between the tracks and ribs or walls of coal to protect miners at their work; and the duty to provide proper passageways in a tunnel is a nondelegable duty imposed upon the mine owner or operator, and it is not one of the statutory duties imposed upon the mine foreman. The duty of providing reasonably safe haulageways with sufficient space to allow a driver to pass between the cars and at least one wall of the mine remains in the mine owner or operator, and his liability depends upon whether he complies with the requirements of the law, and in the absence of legislative demands he must make such haulageways reasonably safe for the purpose for which they are used.

Watson *v.* Monongahela River Consolidated Coal & Coke Co. (Pennsylvania), 93 Atlantic, 625, p. 626, January, 1915.

FAILURE TO PROVIDE REFUGE HOLES.

The operator of a mine may be liable on a charge of negligence for the death of a coal miner struck while on a slope in a coal mine by a running car on the ground of negligence in the failure to provide places of refuge or other safety devices in the slope where the deceased miner and others were required to pass in and out of the slope at the time cars were being operated upon a track in the slope.

Parkdale Fuel Co. *v.* Taylor (Colorado), 144 Pacific, 1138.

DUTY OF OPERATOR TO PROVIDE REFUGE HOLES.

The statute of Indiana, section 8581, Burns's Annotated Statutes, 1914, requires mine operators to provide places or refuge holes in the side walls of the mine of every haulageway used as a passageway by employees in traveling to and from their work where there is not a clear space of at least 3 feet in width between the side of the car and the wall or rib; and a complaint in an action by a miner for an injury is sufficient where it avers that the operator failed to provide such places of refuge and the space was less than 3 feet in width and the miner was injured while passing along the haulageway; and the complaint need not allege that it was practicable to construct

places of refuge without interfering with the working of the mine; nor is it necessary to allege that the operator had actual or constructive notice that the space between the side wall and the car was less than 3 feet, as the violation of a statutory duty is negligence per se.

Vandalia Coal Co. *v.* Coakley (Indiana Appeals), 180 Northeastern, 382, p. 384, March, 1915.

FAILURE TO MARK DANGEROUS PLACE—PROXIMATE CAUSE.

The fact that miners are engaged, under the direction of the mine manager, in cleaning up a coal mine after a shutdown of several months, and working under his general direction to make dangerous places safe does not relieve the mine operator of the statutory duty of having the mine examined by the proper mine examiner and of marking the dangerous places. The question of whether the failure of the mine examiner to mark the dangerous places was the proximate cause of the injury is a question of fact for a jury to determine on the trial of the cause.

Wilson *v.* Danville Collieries Co. (Illinois), 106 Northeastern, 194, p. 196, October, 1914.

INJURY FROM FALL OF ROOF—PRIMA FACIE CASE.

Proof that a coal miner was injured by a fall of slate from the roof of an entry which it was the operator's duty to maintain and keep in a reasonably safe condition, and that the miner had not removed any coal from the particular part of the entry and had done no act that could have occasioned the fall of the slate, is sufficient to make a prima facie case of negligence under the doctrine of res ipsa loquitur.

Main Jellico Mountain Coal Co. *v.* Young (Kentucky), 169 Southwestern, 841, p. 842, October, 1914.

COMPLETED CHAMBER.

The rule that a mine operator is not required to furnish a reasonably safe working place to a miner where the conditions of the working place are constantly changing does not apply to a completed chamber or station, and where there are no such changing conditions in the chamber or station which make it impracticable to make it safe, and especially where the mine operator had timber lying unused at the mouth of the shaft that would unquestionably have made the place safe.

Crabbe *v.* Mammoth Channel Gold Mining Co. (California), 143 Pacific, 714, p. 716.

SAFE PASSAGEWAY.

The relation of mine owner or operator and a miner raises a legal duty upon the part of the operator to furnish the miner with a reasonably safe place in which to work, and this duty carries with it the

obligation to see that a passageway through the mine to and from the miner's working place was reasonably safe.

Hazzard *v.* Consolidated Coal Co. (Michigan), 149 Northwestern, 991, p. 992, December, 1914.

DUTY OF OPERATOR TO MAINTAIN MOTOR TRACKS IN MINE.

Motor tracks in a main haulageway of a coal mine partake of the nature of both a place and an appliance, and as they are permanently laid in the mine they therefore become a part of the place and are essential to the operation of the motor and therefore an appliance for the removal of coal, and it is the duty of the mine operator to maintain his motor and motor tracks in a reasonably safe and suitable condition for the safety of an employee operating a motor in hauling coal out of a mine.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 942, April, 1915.
Crockett *v.* Keystone Coal & Coke Co. (West Virginia), 84 Southeastern, 948, April, 1915.

RELATIVE DUTY OF OPERATOR AND FOREMAN AS TO MOTOR TRACKS.

The statute of Alabama requires a mine operator to employ a mine foreman and prescribes the duties of the mine foreman to be, among other things, to keep and carefully watch over the ventilating apparatus and the airways, travelingways, pumps, and drainage, and to see that proper break-throughs are made, brattices used, no loose coal, slate, or rock is hanging overhead or along the haulageways, and sufficient props, caps, and timbers are furnished to miners, the water drained out of the working places and recesses made along the haulageways of not less than 100 feet apart between the wagon and the ribs for refuge, and provide a proper system of signals and lights where hauling is done by machinery of any kind; but nowhere is the foreman expressly given supervision of the motor tracks, and he is not required to see that they are maintained in a safe and suitable condition, nor does the statute mean to impose that particular duty upon the mine foreman, as supervision of the tracks is not a duty to be implied and it is not essential to the complete performance of any of the acts expressly required of the mine foreman; and under the statute thus considered it therefore remains the imperative duty of the mine operator to see that the tracks, trolley wire, and motors are maintained in a reasonably safe condition.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 942, April, 1915.
Crockett *v.* Keystone Coal & Coke Co. (West Virginia), 84 Southeastern, 948, April, 1915.
See Crockett *v.* Black Wolf Coal & Coke Co. (Alabama), 83 Southeastern, 987.

DANGEROUS TRACK FOR MOTOR.

A mine operator may be liable on the ground of negligence for an injury to a motorman caused by a plank from an old and decayed floor over which the car was required to be run flying up, protruding into the cab and striking the motorman, where the operator maintained its track on an old shop floor, much decayed and of doubtful strength and consistency to operate heavy motors upon even as a temporary makeshift, with the knowledge that mine motors are necessarily built low, are operated close to the track, and loose boards on the track would be liable to fly up and come in on the floor of the cab where the motorman is required to sit and produce such an injury as that complained of.

Yates *v.* Crozer Coal & Coke Co. (West Virginia), 84 Southeastern, 626, p. 629, March, 1915.

DEFECTIVE TRACK—DUTY OF OPERATOR TO REPAIR.

In an action by a miner for injuries caused by his head being caught between a car he was pushing and the wall or rib of the entry, due to an alleged defect in the track, where the question of liability depends on whether the mine operator was to lay the track or whether it was the miner's duty to lay the track, the question of negligence or contributory negligence becomes a question of fact for the jury to determine, and in determining the question the jury has the right to consider the fact that the miner was furnished light rails for the track in his room, while the mine operator laid its part of the track with a heavier rail, and to consider the further fact whether the accident happened while the car was running on the lighter rails or on the heavier rails; and the jury has a right to rely upon the further fact as tending to make the mine owner liable, that the pit boss had examined the defect in the track and promised to have it repaired, as this was a recognition by the operator of the duty upon his part to repair the defect.

El Paso County Land & Fuel Co. *v.* Perdaris (Colorado), 147 Pacific, 675, April, 1915.

PROMISE TO REPAIR.

Where an employee or miner makes a complaint to his employer of a dangerous defect in his place of work, or in the appliances furnished him with which to work, and the employer makes an unconditional promise to repair the defect, the risk of the defect is cast upon the employer until such time as would preclude all reasonable expectation that the promise might be kept, unless the danger from the defect is so imminent that a person of ordinary prudence would not risk injury therefrom; and there can be no distinction in principle, in so far as the liability of an employer is concerned, between an unconditional

promise to repair and a promise to repair on a certain date, or after the happening of a particular event.

El Paso County Land & Fuel Co. *v.* Perdaris (Colorado), 147 Pacific, 675, p. 677, April, 1915.

ESCAPEMENT FROM SHAFT—SIGNALING SYSTEM.

While the doctrine of safe place does not apply in the construction of a mine shaft, whether in excavating or timbering, yet an operator may be liable for a person injured in the sinking of a shaft if he failed to furnish a suitable ladder by means of which the injured employee could get out of the shaft promptly in case of an emergency, and in the failure to furnish a proper and suitable signaling system from the bottom of the shaft or from points in the shaft, so that the bucket or cage could be promptly lowered or hoisted in case of an emergency and where workmen would be required to get out of the shaft quickly in order to be reasonably safe.

Benson *v.* Jones & Laughlin Ore Co. (Michigan), 151 Northwestern, 707, p. 708, March, 1915.

LIABILITY TO INFANT EMPLOYEE.

The liability of an employer for injuries sustained by an infant employee in the course of his employment depends upon the infant's capacity to comprehend and avoid the incidental dangers and whether he is fully advised concerning them; but in the absence of such capacity and intelligence the employer can not escape liability on the ground that the injury to the infant or minor was due to accident or negligence of a fellow servant; and the duty imposed as to dangers incident to the work and not patent to the infant, or the existence of which he is not advised, or by reason of lack of incapacity and experience he can not appreciate or avoid, requires the employer to respond in damages for injuries resulting from such dangers.

Dillon *v.* United States Coal & Coke Co. (West Virginia), 84 Southeastern, 956, p. 959, April, 1915.

DUTY TO PROMULGATE RULES.

Section 493, Code 1913 of Alabama, requires every mine operator to adopt special rules for the government and operation of his mine, covering all the work pertaining thereto in and outside of the same and contemplates the making of a rule regulating the operation of motors and limiting the maximum number of loaded cars that may be hauled on any single trip, as this pertains to the operation of the mine and for the reason that there is more danger in operating a long train than a short one, and a rule on the subject would be a reasonable requirement.

Jaggie *v.* Davis Colliery Co. (West Virginia), 84 Southeastern, 941, p. 943, April, 1915.

DUTY TO PROVIDE SAFE APPLIANCES.

USING DEFECTIVE APPLIANCES—MINER'S CARE.

The rule is that a miner is under no obligation to inspect the instrumentalities provided by the mine operator in order to discover concealed defects or dangers not disclosed by his superficial observation, but the miner may assume that the instrumentalities furnished him by the mine operator are not defective, but suitable for the purposes for which they are furnished, and he is not called upon to seek for and discover hidden defects; but if the defect is obvious and apparent, then he must be held to have assumed the risk of using the defective tool or implement.

Alamo Oil & Refining Co. *v.* Richards (Texas Civil Appeals), 172 Southwestern, 159, p. 160, January, 1915.

DEFECTIVELY EQUIPPED CAGE.

A coal-mining company is liable on the ground of negligence for the death of a miner working at the bottom of a shaft and killed while so working by being struck on the head by a lump of coal that fell down the shaft after being knocked from the bunting of the tipple by an ascending cage in the compartment of the shaft, where the evidence tended to show that the car leaving the lump of coal on the bunting was overloaded and where the evidence tended to prove that the operator had failed to furnish a properly constructed bonnet or other appliance for the protection of the miner from falling coal, and had in that respect failed to exercise reasonable care in furnishing the miner a reasonably safe working place.

Osage Coal & Mining Co. *v.* Miozrany (Oklahoma), 143 Pacific, 185.

DEFECTIVE KICK SWITCH.

A coal-mine operator in Pennsylvania is liable on the ground of negligence for an injury to a driver caused by a collision between two trips of cars, where the collision was the result of a defective appliance known as a kick switch, and the tracks at the location of the switch were in such bad repair that at times the rails broke away from the ties and where there was not sufficient space between the cars and the ribs or walls of coal for the driver to stand in safety, and where the mine foreman and the operator's superintendent both had knowledge of all conditions for at least two weeks before the accident, although the mine was in charge of a certified foreman.

Watson *v.* Monongahela River Consolidated Coal & Coke Co. (Pennsylvania), 93 Atlantic, 625, p. 627, January, 1915.

DEFECTIVE CABLE.

An oil-drilling company is liable on the ground of negligence for using an old, worn, and unsafe "bull rope," and by reason of the defective condition of such rope an employee was injured, where it appears that he had no knowledge of the defective condition of the rope.

Producers' Oil Co. *v.* Eaton (Oklahoma), 143 Pacific, 9, p. 10.

SIMPLE APPLIANCES—DEFECTS IN CONSTRUCTION.

The rule that where a tool or implement is so simple that inspection is not necessary and a man of ordinary intelligence can see any existing defects, then a servant or miner will be charged with an assumption of the risk arising from the use of such a defective implement; but the rule does not apply where the defect is not obvious, but is a latent or concealed defect; but the exception also applies to a ladder furnished by an oil operator, where the injury complained of was occasioned by the giving away of the step or round of a ladder because the nails used by the oil company in constructing the ladder were not large enough for the purpose for which they were used, and where the oil company knew the kind of nails used in fastening the steps on the side of the ladder, and was accordingly charged with the knowledge that the nails were too small, such defective construction being concealed from the employee; and in the absence of observable defects he had the right to assume that his employer had used nails of a size requisite and sufficient to securely fasten the steps of the ladder.

Alamo Oil & Refining Co. *v.* Richards (Texas Civil Appeals), 172 Southwestern, 159, p. 160, January, 1915.

SIMPLE APPLIANCES—REMEDY BY MINERS.

Generally as a means of protection to his miners a coal-mine operator must exercise reasonable care and diligence to keep in repair and good order the machines and appliances used by his miners, and keep himself informed as to their condition by inspection, but a mine operator is not liable for an injury occasioned by a defect arising out of the use of an appliance and susceptible of simple, easy, adequate, and timely remedy by the miners themselves in the absence of proof of his assumption of duty to inspect for such defects and correct them.

Martin *v.* Carter Coal Co. (West Virginia), 84 Southeastern, 574, p. 575, February, 1915.

INSPECTION OF SIMPLE APPLIANCES.

The fact that a coal miner charged with the duty of coupling or loading coal cars and seeing an iron bar or pin, an inch in diameter and approximately 7 inches long, bent slightly out of position, can bend it back to its place by a blow or two from a hammer, pick, or other ordinary implement used about his place of work is a matter of common knowledge of which courts may take judicial notice. The remedy in such case was so simple and easy that presumptively and naturally it would fall within the province and duty of the car-coupler, and provision of a system of inspection for the discovery of such defects would be practically useless, and the law does not impose it in the absence of assumption of such duty by the mine operator.

Martin *v.* Carter Coal Co. (West Virginia), 84 Southeastern, 574, p. 576, February, 1915.

INSPECTION OF MOTOR BY MOTORMAN—LIABILITY FOR INJURY.

A mining corporation owes to its employees the duty to inspect and examine appliances used by them, and this duty is nondelegable; but as corporations can act only through agents they may by general rules impose the duty of inspection upon the employees using the machine or other appliance to the extent that he is competent to make such inspection, and the circumstances afforded him an opportunity of doing so; and the mine operator is not liable for injuries to a motorman caused by defects in the motor where a rule of the mine required the motorman to give his motor daily inspection, and not to run or operate the same unless he believes it to be in an entirely safe condition for service.

Pocahontas Consolidated Collieries Co. *v.* Hairston, 83 Southeastern, 1041, p. 1043 (Virginia), January, 1915.

DUTY TO WARN OR INSTRUCT.

INJURY TO UNINSTRUCTED MINOR EMPLOYEE.

A mine operator is liable in damages for injuries to a minor employee, where the employee was engaged to perform some particular but not hazardous services about a coal tipple, and to carry samples of coal mined from the tipple to the office of the operator for inspection and tests, and where, without instructing him as to any secret or hidden dangers or as to the condition of the track, the mine superintendent directed such minor employee to go in between loaded cars of coal to assist others in pushing them down to the tipple, and where, in doing so, and without any knowledge of the condition of the track and being unable to see because of the presence of the car in front of

him, he caught his foot in a switch and the foot was run over and crushed by the car immediately following the one being pushed.

Dillon *v.* United States Coal & Coke Co. (West Virginia), 84 Southeastern, 956, p. 957, April, 1915.

DUTY TO INSTRUCT INFANT EMPLOYEE.

The law imposes upon a mine operator the duty to warn and instruct an infant employee of latent dangers; and if such infant employee, in obeying the orders of a general superintendent, engages in services other than those regularly assigned to and performed by him, dangers from which such employee does not comprehend or appreciate because unknown to him, but of which the employer knows or by the exercise of reasonable diligence ought to know, and fails so to warn and instruct the youthful employee, the mine operator is liable for resulting injuries to such infant employee, where he is free from negligence directly contributing thereto.

Dillon *v.* United States Coal & Coke Co. (West Virginia), 84 Southeastern, 956, p. 958, April, 1915.

LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.

WHO ARE FELLOW SERVANTS.

A master or mine operator is not responsible to his servant or miner for the negligence of a fellow workman engaged in the same common employment; and in determining whether an employee through whose negligence defects in the machinery have failed of discovery or repair is a representative of the master or operator in the discharge of his duty to the servant or miner, or is a fellow servant of the latter engaged in a common employment, it is only necessary to determine whether the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment; and if so, then he is not intrusted with the employer's duty to his fellow servant, and the employer is not responsible to such fellow servant for his fault; but if the employer has cast a duty of inspection or repair upon the employee who is engaged in using the apparatus in a common employment with his fellow employees, then such employee in the particular duty represents the employer, and the latter is chargeable with his default.

Martin *v.* Carter Coal Co. (West Virginia), 84 Southeastern, 574, p. 576, February, 1915.

TEMPORARY DANGER—VIOLATION OF RULES.

A trammer working in a mine can not recover from the mine operator for an injury caused by the negligence of a blockholer in rolling and throwing stones and materials down an incline in a stope, as

such injury was the result of the negligence of a fellow servant in the same general employment and performing a duty that the operator had a right to delegate to another employee, as ordinarily a mine operator who has provided a safe place, proper appliances, and competent employees fully instructed as to their duties and as to the proper rules and regulations for the safe conduct of the business which are made known to them, is not liable for the negligence of an employee failing to notify a fellow servant of a transitory or temporary danger caused by his acts which will for the moment render the environment unsafe, but which can easily be avoided by due warning, it is the duty to give under rules of which all interested employees have knowledge.

Juntunen *v.* Quincy Mining Co. (Michigan), 151 Northwestern, 571, March, 1915.

OBEYING DIRECTIONS OF FOREMAN.

A foreman having authority to direct miners and the work in a mine is a vice principal, and a miner who follows the judgment of such vice principal is not, as a matter of law, guilty of contributory negligence, unless the situation was so manifestly dangerous that a man of ordinary prudence, in the exercise of due caution, would refuse to obey.

Lindquist *v.* Pacific Coast Coal Co. (Washington), 142 Pacific, 445, p. 447.

PROXIMATE CAUSE.

A mine operator is not liable for an injury to a trammer caused by the negligence of a fellow trammer while attempting to replace a loaded car or buggy upon the track, though the car had been derailed because of the defective condition of the track, as such defective condition of the track was not the proximate cause of the injury, as the jumping of the car from the track in itself did not cause the injury, and the operation of putting the car back on the track was not dangerous if properly conducted, and was an operation distinct in itself.

Sabela *v.* Newport Mining Co. (Michigan), 598, p. 600, March, 1915.

MINE OPERATOR NOT LIABLE.

A mine operator is not liable for an injury caused by the negligence of a fellow miner under the same general employment where the operator has provided a safe place, proper appliances, and competent employees.

Zap *v.* Newport Mining Co. (Michigan), 151 Northwestern, 554, March, 1915.
Mesich *v.* Tamarack Mining Co. (Michigan), 151 Northwestern, 564, p. 565, March, 1915.
Juntunen *v.* Quincy Mining Co. (Michigan), 151 Northwestern, 571, p. 572, March, 1915.
Sabela *v.* Newport Mining Co. (Michigan), 151 Northwestern, 598, March, 1915.

NEGLIGENCE OF SHIFT BOSS.

A trammer in the employ of a mining company can not recover for injuries where he was engaged in taking out ore just blasted for the purpose of putting up timbers, and where by reason of the place looking dangerous he requested the shift boss to make an inspection and where the shift boss did inspect the place and instruct the miner that it was ready and to resume his work, and where the miner on resuming work was shortly afterward injured by the falling of a quantity of roof and ore, on the ground that the negligence of the shift boss was the negligence of a fellow servant.

Zap *v.* Newport Mining Co. (Michigan), 151 Northwestern, 554, March, 1915.

MINER'S WORKING PLACE—SAFE PLACE.

SAFE-PLACE DOCTRINE—APPLICATION.

The "safe-place" doctrine does not apply as a general rule, where the perils to which a miner is subjected are all his own creation, and where, as a result of the miner's work the character of the place is constantly changing; and this rule applies to extracting coal by a miner; and the duty of inspection may, by the contract of hiring or by mutual understanding or custom, in the absence of a statute, be imposed upon the miner; and under such circumstances it is error for a court to instruct a jury, as a matter of law, that the duty of inspection devolved upon the operator.

Eagle Coal Co. *v.* Patrick (Kentucky), 170 Southwestern, 960, p. 962, December, 1914.
Music *v.* Northeast Coal Co. (Kentucky), 170 Southwestern, 971, p. 972, December, 1914.

INSPECTION—PROOF OF CUSTOM.

In an action for damages by a miner injured while working in a mine at a place known as a "glory hole," and where it was the duty of the injured miner, together with others, to remove the broken rock and earth after the drillers drilled the hole and fired the shot, it is proper to prove a rule or custom to the effect that after each shot fired inspection is made of the walls to see that no loose rock remains.

Beatson Copper Co. *v.* Pedrin, 217 Fed., 43.

MINER'S DUTY TO MAKE SAFE.

The making safe of a miner's working place, the place where he is extracting coal, involves three distinct duties: (1) The duty of examining the roof and of determining when protection must be provided against possible falling of the roof and whether ordinary props will be sufficient protection; (2) the duty of placing the props

in position when ordinary props are deemed sufficient protection; (3) the duty of timbering the place when ordinary props have been deemed insufficient protection.

Eagle Coal Co. *v.* Patrick (Kentucky), 170 Southwestern, 960, p. 961, December, 1914.

DUTY TO PROP ROOF—CUSTOM OF MINE.

Ordinarily it is the duty of the mine operator to furnish the necessary props and the duty of the miner to prop his own room; but where a room has been practically worked out and is used as a roadway for loaded cars to reach the entry, the question whether it is the operator's or the miner's duty to prop the roof over the roadway will depend on the custom of the mine.

Stringer *v.* York (Kentucky), 170 Southwestern, 527, November, 1914.

MINER'S FAILURE TO PROP—PROXIMATE CAUSE.

In an action by an injured miner where an injury complained of was not the proximate result of an original defective condition of the roof of an entry, or if the miner failed to do additional propping as the work progressed, then, under the statute of Alabama, he can not recover, though the operator was negligent in failing to remedy the original defect, if the miner's failure to do additional propping as the work progressed contributed with the original defect in the roof of the entry in producing the injury complained of.

Lookout Fuel Co. *v.* Phillips (Alabama), 66 Southern, 946, p. 949, November, 1914.

MINER MAY PRESUME PLACE IS SAFE.

When a mine operator directs a miner to work in a particular place or room, the miner may assume that the operator has performed his duty in furnishing him a reasonably safe place in which to work and he can proceed with his work relying upon this presumption; and it is not the duty of the servant under such circumstances to discover defects, and unless he knows of their existence, or they are patent and obvious to a person of his experience and understanding, he is not precluded from recovering for injuries sustained while working at the direction of the opertaor.

Interstate Coal Co. *v.* Garrard (Kentucky), 173 Southwestern, 767, p. 769, March, 1915.

DEGREE OF CARE REQUIRED OF MINERS.

Where miners are employed in drifting and working into new formations, the degree of care which they will be called upon to exercise for their own protection to avoid injury from a cave or from falling rock will be very much greater than the degree of care imposed

upon them in using the older workings which are or should be in a thoroughly protected condition, but which they have the right to assume are in such condition.

Crabbe *v.* Mammoth Channel Gold Mining Co. (California), 143 Pacific, 714, p. 715.

MINER NOT REQUIRED TO INSPECT.

A miner working in a chamber of a mine 10 feet high, lighted only by the light used by him in mining is not required to inspect the roof of his chamber or station, but under such circumstances he is charged with the duty of exercising only such an amount of care as the law presumes that every person will employ for his own interest and preservation, and the quantity of that care will depend upon and vary with the degree of hazard of the particular occupation.

Crabbe *v.* Mammoth Channel Gold Mining Co. (California), 143 Pacific, 714, p. 715.

MINER OBEYING INSTRUCTIONS.

MINER ACTING UNDER ORDERS OF OPERATOR—DANGEROUS PLACE.

A servant or miner is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice, and still more upon their orders, and if a master or mine operator orders a servant or miner to do some act which is dangerous, but which could be made less dangerous by the use of special care on the part of the master or operator, the servant or miner has a right to assume that such special care would be taken, and does not take the greater risk upon himself, as in such case the servant's dependent and inferior position is to be considered, and if the master or operator gives him positive orders to go on with the work, under perilous circumstances, the servant or miner may recover for the injury thus incurred, if the work was not obviously so dangerous that any man of ordinary prudence would have obeyed.

Borderland Coal Co. *v.* Small (Kentucky), 170 Southwestern, 8, p. 10, November, 1914.

ASSURANCE OF SAFETY—EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.

Where a miner's working place in a mine is being constantly changed as the work progresses a miner will be held to have assumed the risks incident to his labors, but an exception exists to this rule in that it may happen in the prosecution of the work of mining that the safety of the place will become an object of inquiry calling for an expression of judgment, and under such circumstances a miner who follows the assurance and judgment of the mine operator or his fore-

man will not be charged with an assumption of risk or held to be guilty of contributory negligence as a matter of law, as the assurance is that it is safe to remain in the questioned situation long enough to accomplish the thing to be done, such as removing coal from the particular working place.

Lindquist *v.* Pacific Coast Coal Co. (Washington), 142 Pacific, 445, p. 447.

CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

An action by an injured miner against an operator for damages for injuries caused by a fall of rock from the roof is not to be defeated on the ground of contributory negligence as a matter of law, where the miner, after discovering the dangerous condition of the roof, sent for the superintendent of the mine and called attention to the overhanging rock and suggested to the superintendent that it would be safer to drive the entry by pick mining and not by machinery, with its resulting noise and vibration, and where the superintendent sounded the roof with a pick for the purpose of ascertaining whether the rock, a part of which was in plain view, was likely to fall, and who, after thus testing it for the purpose of satisfying himself of its safety, instructed the miner to use the machine and proceed with his work, and where after proceeding to cut the coal by the machine process and had only driven the entry a short distance when the rock fell and injured him, as the question of contributory negligence under such circumstances is one of fact to be determined by the jury.

Moleskey *v.* South Fork Coal Mining Co. (Pennsylvania), 93 Atlantic, 485, p. 486, January, 1915.

RISKS NOT ASSUMED—MINER WORKING UNDER DIRECTION OF OPERATOR.

The rule is that when a place in which a miner is engaged in working is not such as imposes upon the mine operator the full duty of providing a safe place, but is somewhat hazardous or dangerous, although not obviously so, or the danger of continuing is not so apparent that a person of ordinary intelligence would not undertake it, and the miner is assured, in substance or in effect, by the operator or his foreman who is present that it is reasonably safe or that there is no danger, and he is directed by the operator or foreman to continue the work, the miner may recover for injuries received while proceeding with the work, although the risk or hazard in prosecuting the work is as well known to the servant as to the operator or foreman. The reason of this rule is that when the mine operator is present the doctrine of equal knowledge and assumed risk, invoked to relieve the mine operator, should be sparingly applied, and in such case the miner's dependent and inferior position is to be taken into

consideration, as it is not his duty to sit in judgment upon the propriety of the direction or to enter into a discussion with the operator as to the facts upon which his judgment is based, but he may presume that improper orders would not be given and assume that the operator or foreman would not direct him to take risks that were improper. The limitation on this rule is to the effect that the miner can not recover where the risk was such that a person of ordinary prudence, situated as the miner was, would not have undertaken it.

Northeast Coal Co. *v.* White Oak Coal Co. (Kentucky), 174 Southwestern, 732, p. 733, March, 1915.

OBEYING INSTRUCTIONS OF SUPERIOR.

A miner is not called upon to set up his own unaided judgment against that of the superintendent of a mine, and he may rely upon the advice and skill and follow the orders of the superintendent, notwithstanding any misgivings of his own, as under such circumstances the miner's dependent and inferior position is to be taken into consideration; and in such case, if the superintendent gives him positive orders to go on with the work under perilous conditions and circumstances, the miner may recover for an injury thus incurred if the work was not inevitably and imminently dangerous; and the question as to whether the work was inevitably and imminently dangerous may be a question of fact.

Moleskey *v.* South Fork Coal Mining Co. (Pennsylvania), 93 Atlantic, 485, p. 486, January, 1915.

DIRECTING WORK IN DANGEROUS PLACE.

The rule that a mine operator is not required to furnish a safe place where the miner himself is engaged in making the place does not apply where the operator by its foreman directed a young and inexperienced miner to go into a room where he had not been working to cut down the coal with a mining machine run by electricity, and where the miner was injured by a fall of slate while operating the machine cutting the coal, and where the operator knew that the place was not safe.

Interstate Coal Co. *v.* Garrard (Kentucky), 173 Southwestern, 767, p. 768, March, 1915.

MINER MAY RELY ON JUDGMENT OF SUPERIOR.

The rule that a mine operator is required to furnish a miner a safe working place does not apply where the miner himself is engaged in making the place; and the rule may apply to the work of mining out or exhausting pillars in a mine which is from its very nature more or less hazardous; but the rule does not apply where miners, having removed the greater part of the coal from a pillar and having

left only one or two small pillars as natural supports, which the miners intended to leave as supports, and on reporting such fact to the foreman, were assured that it was safe to remove the pillars and stumps and were thereupon directed by him to do so, as the miners had the right to rely upon the assurance of the foreman if the danger was not so obvious and imminent that no reasonably prudent man would undertake it even under the positive orders of the foreman or operator.

Northeast Coal Co. *v.* White Oak Coal Co. (Kentucky), 174 Southwestern, 732, March, 1915.

ASSURANCES OF SAFETY.

In directing an inexperienced miner to operate a machine for cutting coal in a room or entry where he had not been working, it is not necessary that the operator should use words which in terms expressly or directly assured the miner that the place where he was directed to work is a reasonably safe place; but it is sufficient if the acts of the operator under all the circumstances amount to an assurance that the place where he directs the miner to work is a reasonably safe place.

Interstate Coal Co. *v.* Garrard (Kentucky), 173 Southwestern, 767, p. 768, March, 1915.

CONTRIBUTORY NEGLIGENCE OF MINER.

CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

Neither the defense of contributory negligence nor the defense of assumption of risk can arise unless the defendant in the action—a mine operator—has been guilty of negligence which, but for want of both of these defenses, would render the operator liable for damages to an injured miner, as in the absence of such negligence there is nothing against which to make such a defense; but if there is evidence from which a jury may find the operator guilty of such negligence, then either of these defenses, if it exists in fact, is available to the defendant operator in order to defeat a recovery.

Osage Coal & Mining Co. *v.* Sperra (Oklahoma), 142 Pacific, 1040, p. 1043.

CLIMBING ON MOVING CAR.

A mine foreman or tipple boss who had been in charge of the tipple and the work connected therewith continuously for a year and a half, and whose duty it was to inspect its conditions and report defects, and who was also intrusted with the duty of supervising and directing the moving and loading of coal cars at the tipple, and of directing the other employees of the mine operator working at the tipple, is guilty of such contributory negligence as will prevent a

recovery for his death caused while attempting to climb on a moving car and in doing so placed one foot in the stirrup at the front and corner of the car and the other on the car beam, and while in this position the car in passing under the tipple caused his body to come in contact with a tipple post or brace and be caught between it and the moving car, which crushed and killed him.

Louisa Coal Co. *v.* Hammond (Kentucky), 169 Southwestern, 709, p. 711, October, 1914.

MINER REMOVING PROPS.

Where the roof over a roadway was securely propped by the mine operator and the miner in removing the tracks knocked the props down, he can not recover for a subsequent injury caused by the falling of the roof of the roadway on the ground that it was not securely propped.

Stringer *v.* York (Kentucky), 170 Southwestern, 527, p. 528, November, 1914.

TRACK MAN OPERATING MOTOR.

There can be no recovery for the death of a track man employed in a mine where he voluntarily took charge of the motor hauling loaded cars out of the mine and where he operated the motor with the trolley in front, and while being thus operated the trolley jumped from the wire and struck against the roof of the mine and the driver was either hit by the pole or in getting out of the way of the pole was caught between the motor and the timbers, and where it appeared that his use of the motor was in violation of a rule of the mine.

North Jellico Coal Co. *v.* Disney (Kentucky), 171 Southwestern, 192, December, 1914.

STOPPING IN FRONT OF MOVING CAR.

A miner working in a mine, who without looking stopped in front of a moving car and was struck and injured thereby, is guilty of such contributory negligence as will prevent a recovery for such injury.

Ranzier *v.* Monongahela River Consolidated Coal & Coke Co. (Pennsylvania), 93 Atlantic, 501, p. 502, January, 1915.

RIDING ON CAR IN VIOLATION OF RULE.

In an action by a licensee for an injury while riding on a tramcar in a mine, where the complaint averred that the plaintiff was, when injured, in a place where he had a lawful right to be, imposes upon the plaintiff the unnecessary burden of vindicating his right to be on the tramcar at the time he was injured, and the defendant, the mine operator, may, under the general issue prove the existence of a rule prohibiting employees riding on the cars.

Woodward Iron Co. *v.* Finley (Alabama), 66 Southern, 587, p. 588, November, 1914.

VOLUNTARY EXPOSURE TO DANGER—PROXIMATE CAUSE OF INJURY.

A miner working in a coal mine is bound to take notice that it is a dangerous occupation and it is his duty to use ordinary care and prudence to observe the rules and customs of the mining company employing him, not in violation of law, to prevent an accident or injury; and where a miner is informed or has notice of danger which threatens injury to himself, or where he voluntarily puts himself in a dangerous place, or where, by ordinary observation and care, he could avoid such danger by reasonable exertion, and fails to do so, he is guilty of contributory negligence. The term "contributory negligence," as here used, must be such negligence on the part of the miner as helped to produce the injury complained of, and in order for such contributory negligence to be sufficient to prevent the miner from recovering it must have been the proximate cause of his injury.

Rock Island Coal Mining Co. *v.* Davis (Oklahoma), 144 Pacific, 600, p. 606, December, 1914.

MINER PLACING HIMSELF IN DANGEROUS POSITION.

A mine operator is not liable for injuries to an engineer employed to operate the engine used for hoisting ores from its mine, where, while he was cleaning the engine, he was injured by steam escaping from the boilers into the cylinders and starting the engine suddenly, where it appears that the engineer was thoroughly experienced in handling the engine, knew its condition and that its throttle valve had leaked steam into its cylinders for years, and that the defect was getting worse, and where he knew from constant observation and practical experience that the engine was liable to start any moment even with the throttle valve closed and the cylinder cocks open, and where in discharging his duties in respect to cleaning the engine between car trips it was wholly unnecessary for him to be in the position in which he was and where he placed himself and the parts of his body in such dangerous position thoughtlessly and in utter disregard of the obvious and imminent danger.

Sloss-Sheffield Steel & Iron Co. *v.* Reid (Alabama), 68 Southern, 136, p. 137, February, 1915.

SETTING CAR IN DANGEROUS PLACE.

A miner creates his own dangerous working place and is guilty of such contributory negligence as will prevent a recovery where while laying a track in a room neck he pushed a car back a short distance in the neck, and where the injury complained of was caused by the car being struck and moved down upon him by a trip of cars over the main track, and where it also appeared that the injured miner knew that the driver would be along soon, and where the driver had no notice that such car in the neck was not in the clear.

Jellico Coal Mining Co. *v.* Gothard (Kentucky), 170 Southwestern, 649, November, 1914.

VIOLATION OF RULES.

A coal operator may prescribe and promulgate reasonable rules for the performance of the respective duties of the miners, and where such rules have been properly established the operator is entitled to a compliance therewith by the miners; but if the miner elects to perform his duty by a method known to him to be dangerous, and in violation of the established rules, the operator will not be liable for an injury to the miner, whether the danger is obvious or not, and the contributory negligence of the miner in the violation of the rule may preclude his recovery, but to do so the violation of the rule must contribute to and cause the injury complained of.

San Bois Coal Co. *v.* Resetz (Oklahoma), 143 Pacific, 46, p. 50.

VIOLATION OF RULE—PROXIMATE CAUSE.

The violation of a rule by a miner working in a mine will not defeat a recovery in an action for his death on the ground of the alleged negligence of the coal mine operator, unless it is made to appear that such violation of the rule was the proximate cause of the death of the miner.

San Bois Coal Co. *v.* Resetz (Oklahoma), 143 Pacific, 46, p. 50.

QUESTION OF FACT AS TO EXISTENCE OF RULE.

It is a question of fact for a jury as to whether or not a miner was guilty of contributory negligence in going down into a mine in a car, upon the occasion when he lost his life, in violation of a rule of the mine operator prohibiting miners from doing so, where the evidence is conflicting as to whether or not such a rule existed and whether or not it applied to persons or miners going down in cars with timbers to scotch when the cable was being changed.

Southern Iron & Steel Co. *v.* Boston (Alabama), 66 Southern, 684, p. 686, November, 1914.

CONTRIBUTORY NEGLIGENCE A QUESTION OF FACT.

The statute of Michigan provides that no male under the age of 18 years shall be employed in any employment which may be considered dangerous to life and limb; and in an action for the death of a drill boy under 16 years of age employed in a mine, the court can not say as a matter of law that the deceased was guilty of contributory negligence, or that his parents, the beneficiaries, were guilty of contributory negligence, where they had no knowledge of the nature or the dangerous character of the work, but the question of contributory negligence under such circumstances is a question of fact to be determined by the jury.

Paskvan *v.* Allouez Mining Co. (Michigan), 152 Northwestern, 82, p. 84, April, 1915.

Where a trapper in charge of a trapdoor in a haulageway of a mine, whose duty it was to open the trapdoor for the motor and cars, was run over and killed by the motor, there is no presumption of negligence on the part of the decedent, nor is there any presumption of negligence on the part of the motorman; but the negligence of either, or both, must be established by the evidence or by circumstances from which such negligence could properly be inferred and such questions are always properly left to the jury to determine.

Linard *v.* Interstate Coal Co. (Kentucky), 169 Southwestern, 1006, p. 1008, October, 1914.

ADMISSIONS OF NEGLIGENCE—EFFECT.

A miner is not necessarily and conclusively bound by statements made by him immediately after receiving an injury in a coal mine to the effect that the injury was his own fault and it was a foolish thing for him to go to cutting through the vein with the coal in the situation it was, and that he had not struck but two or three blows until it all fell and broke his leg, as such admissions are not admissions of a fact but of a conclusion of law; but the question as to whether he was entitled to recover is not whether there was some risk or danger attending the transaction of his work, but whether it was so apparent and imminent that no reasonable man would have undertaken it, and his statements made do not go to that extent, and especially where the fall of the coal was due to the fact that the mine operator had not furnished the miner props as required by the statute; and the statements made did not support a conclusive inference that the danger was so great that no reasonable man would have encountered it.

Runyan *v.* Marceline Coal & Mining Co. (Missouri Appeals), 172 Southwestern, 1165, p. 1167.

PLEADING CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF ANSWER.

In an action by an injured miner for damages on the ground of the alleged negligence of the mine operator in that the operator failed to furnish the miner a safe place in which to work, an answer to the complaint is sufficient where it avers that the plaintiff himself was guilty of negligence which proximately contributed to the injuries complained of, in that the plaintiff while knowing that a rock in the room in which he was working in the mine was loose and liable to fall, and that if it should fall while he was under or near the same he was likely to be injured, and he negligently worked under or dangerously near such rock and as a proximate consequence thereof the rock fell upon him causing the injuries for which he sues.

Alabama Fuel & Iron Co. *v.* Benenante (Alabama), 66 Southern, 942, p. 943, November, 1914.

PLEADING CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

In an action by a miner for damages for injuries caused by the alleged negligence of the mine operator in failieg to furnish the miner a safe working place, an answer which avers that the miner was informed of the dangerous condition of the rock and the roof of the room at the place at which the injury occurred and knowing that the same was liable to fall at any moment and likely to injure him, yet he negligently placed himself under the same and was injured, is insufficient in that it fails to aver that the negligence on the part of the miner proximately contributed to his injury.

Alabama Fuel & Iron Co. *v.* Benenante (Alabama), 66 Southern, 942, p. 943, November, 1914.

WANT OF KNOWLEDGE OF DANGER.

Defects in the roof of a mine which might be apparent to the eye of a competent inspector might not have any significance to a laborer or employee who has had no experience in this special employment; and under such circumstances it would be unreasonable to charge a miner with contributory negligence merely because he sees defects, unless a reasonably prudent man would under like circumstances, have known or comprehended the risk which these defects indicate. The rule is that the dangers and not the defects alone must be so obvious that a reasonably prudent person would have avoided them, in order to charge the miner with contributory negligence.

Interstate Coal Co. *v.* Garrard (Kentucky), 173 Southwestern, 767, p. 769, March, 1915.

FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE AT OTHER TIMES.

In an action for damages for the death of a miner by the alleged negligence of a mine operator, it is no defense to show that the deceased miner was guilty of negligence and was habitually negligent at times other than that at which he lost his life; and it was no defense where there was an entire absence of proof of contributory negligence at the particular time at which the miner lost his life, as evidence of habitual negligence as to past occurrences is inadmissible to prove contributory negligence on the particular occasion under inquiry.

Great Western Coal & Coke Co. *v.* McMahan (Oklahoma), 143 Pacific, 23, p. 24.
Great Western Coal & Coke Co. *v.* Cunningham (Oklahoma), 143 Pacific, 26.
Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30.
Great Western Coal & Coke Co. *v.* Boyd (Oklahoma), 143 Pacific, 36.
Great Western Coal & Coke Co. *v.* Belcher (Oklahoma), 143 Pacific, 36.

WANT OF KNOWLEDGE OF DANGER OF DEFECTIVE ROOF.

A father in an action for the death of a son, working with him in a mine, is not to be charged with such contributory negligence as will prevent him from recovering, where it does not appear that either the father or the son, who were working together, knew the actual condition of the roof and of the rock that fell, causing the death of the son.

Rocky Mountain Fuel Co. *v.* Kobaics (Colorado), 144 Pacific, 863, p. 866, December, 1914.

MINER ACTING UNDER SUDDEN FRIGHT.

A miner is not, as a matter of law, to be charged with contributory negligence where it appears that he was suddenly frightened by the presence of a mule drawing a car in a haulage way and in order to escape injury by the mule and the car stepped on the side of the track on which there was the least room for the car to pass and in so doing came in contact with an uninsulated electric wire, as the condition of the wire under the circumstances must be regarded as the proximate cause of the injury.

Hazzard *v.* Consolidated Coal Co. (Michigan), 149 Northwestern, 991, p. 992, December, 1914.

ACTING UNDER SUDDEN IMPULSE—PROXIMATE CAUSE OF INJURY.

An employee assisting in drilling an oil well is not, as a matter of law, to be charged with contributory negligence in suddenly applying the brake on the bull wheel in order to stop the descending sucker rods with such force and suddenness as to break the bull rope, where he was directed by the operator of the machinery to apply the brake and where there was a necessity for quick action, and where the injury was caused by the breaking of the bull rope, due to its old, worn, and defective condition, and of which defective condition the employee had no knowledge, as in such case the defective condition of the rope, and not the application of the brake to the machinery, was the proximate cause of the injury.

Producers' Oil Co. *v.* Eaton (Oklahoma), 143 Pacific, 9, p. 10.

RISKS ASSUMED.

KNOWLEDGE OF DANGERS.

A coal-mine operator is not absolutely and unqualifiedly bound to furnish, and is not absolutely and unqualifiedly liable for failure to furnish, a miner a reasonably safe place in which to work and reasonably safe tools and appliances with which to work; but the operator's duty to do so is subject to the qualification that the miner assumes the usual, ordinary, and known risks arising from the operator's fail-

ure to do so, and the risks thus assumed by the miner may have resulted from what would otherwise have been actionable negligence on the part of the operator.

Osage Coal & Mining Co. *v.* Sperra (Oklahoma), 142 Pacific, 1040, p. 1043.

QUESTION OF FACT.

Under the constitution of Oklahoma the defense of contributory negligence or assumption of risk shall in all cases be a question of fact and shall in all cases be left to the jury for determination.

Osage Coal & Mining Co. *v.* Sperra (Oklahoma), 142 Pacific, 1040, p. 1043.

DANGER FROM FALLING ROCK.

A member of a repair crew making repairs in a shaft for the purpose of making the shaft safe, which had been rendered unsafe by the crushing in of the shaft, can not recover for injuries caused by falling rock in the progress of the work, as the danger from such falling rock and material was assumed, where it was the duty of the injured employee and that of his fellow laborers to bore down and carry away such rock as was loose and dangerous in the vicinity of their labor and where it was well known to him that the place was not safe.

Juntunen *v.* Quincy Mining Co. (Michigan), 151 Northwestern, 571, p. 572, March, 1915.

QUESTION OF FACT.

It is a question of fact for a jury to determine whether or not a miner assumed the risk of going down in a car loaded with timbers instead of walking down, where the evidence is such that the jury may infer that the usual and customary way was to take the timber down and come with it in the car, and though the proof may show that it was safer to walk down, but does not conclusively show that it was dangerous or hazardous to ride down on the car.

Southern Iron & Steel Co. *v.* Boston (Alabama), 66 Southern, 684, p. 686, November, 1914.

KNOWLEDGE OF WANT OF SAFETY DEVICES.

A miner who undertakes to work in a mine with knowledge of the absence of a derailing switch at the mouth of the mine and without protection that such switch might give him, and who relies upon the care of his fellow workmen and the efficacy of a wooden block used to guard the mouth of the mine against runaway cars, can not recover against the mine owner for injuries caused by a runaway car, and especially so where the mine was operated by an independent contractor by whom the injured employee was employed.

Connors Weyman Steel Co. *v.* Kilgore (Alabama), 66 Southern, 609, p. 612, November, 1914.

EMPLOYEE ENGAGED IN SINKING A SHAFT.

An employee entering the employment of a mine operator and engaged in the work of sinking a shaft voluntarily assumes all the obvious risks and dangers ordinarily incident to such mining work; and it is his duty to familiarize himself with the imminence of the danger and he is taken to have assumed all the ordinary risks which are incidental to the work of sinking the shaft of which he actually knows, and also such risks which every man, using ordinary prudence and care in the performance of such work, would be bound to learn and know of such result of doing such work, and for an injury resulting from any such obvious or usual risk or danger, there can be no recovery.

Benson *v.* Jones & Laughlin Ore Co. (Michigan), 151 Northwestern, 707, p. 708, March, 1915.

FAILURE TO PROP ROOF.

Under the custom of a mine in Kentucky where it is the duty of a miner to set such props as are necessary and to examine the roof when he blows down the coal, and where danger is created by the miner in the progress of his work, the miner assumes the risk resulting from the change made in the place of work by him in the ordinary progress of the work.

Music *v.* Northeast Coal Co. (Kentucky), 170 Southwestern, 971, p. 972, December, 1914.

EFFECT OF CONTRACT OF EMPLOYMENT.

Assumption of risk is a term of a contract of employment, either express or implied from the circumstances of the employment, and by which the servant agrees that dangers of injury obviously incident to the discharge of his duties, shall be at his risk.

Osage Coal & Mining Co. *v.* Sperra (Oklahoma), 142 Pacific, 1040, p. 1043.

DEATH FROM ASSUMED RISKS—NO RECOVERY.

A miner employed in a mine does not assume all the risks of his employment, but only such as are ordinarily incidental to the employment, and whether a miner assumes the risk or not is a question for the jury, where men of ordinary judgment on the facts might reasonably differ in opinion. Accordingly, where an employee entered the service of a mine operator as a trapper he assumed all the ordinary risks incident to his employment as trapper, and if his death was caused by the ordinary risks of the employment which he had assumed, and not by reason of the negligence of the operator, then there can be no recovery for the death of such trapper.

Linard *v.* Interstate Coal Co. (Kentucky), 169 Southwestern, 1006, p. 1008, October, 1914.

MINER ACTING AS REPRESENTATIVE OF OPERATOR.

A servant or miner is not ordinarily required to make a minute or detailed examination of the place where the master or mine operator puts him to work, nor to take notice of any defects which would not be apparent to one who usually has neither time nor opportunity for more than a casual, hurried glance at the place of work or the instrumentalities, and under such circumstances he may rely on the master or operator having adequately discharged his primary duty of using ordinary care to make the place of work and instrumentalities of work reasonably safe for his use; but where the servant, or miner, as the representative of the master or operator, is himself in control of the place of work, or instrumentalities for doing it, and the manner of its performance, and if he himself undertakes its performance, he then assumes not only the risks or dangers that are obvious but also such as ordinary care on his part in inspecting the place or instrumentalities of work before beginning it, could have enabled him to discover it.

Louisa Coal Co. *v.* Hammond (Kentucky), 169 Southwestern, 709, p. 711, October, 1914.

VIOLATION OF RULE.

A coal miner injured in attempting to remove a coal-cutting machine by a method positively prohibited by a rule of the operator because of its danger, can not recover damages for the injury, and especially where it appears that the injury would not have occurred if the machine had been moved according to the rule and directions of the mine operator.

Fluhart Collieries Co. *v.* Meets (Kentucky), 169 Southwestern, 686, p. 687, October, 1914.

RISKS NOT ASSUMED.

DEFECTIVE CONSTRUCTION OF SIMPLE APPLIANCE.

An employee of an oil company is not charged with the assumption of risk in the use of a defective ladder, where the defect consisted in the smallness of the nails used to fasten the steps on the sides of the ladder and where the defect was not so apparent or obvious as to charge him with knowledge; and an employee is not charged with the duty of inspection, nor even the exercise of ordinary care, the defect being one of construction, and being the case of a ladder constructed by the employer in a defective manner and which defects were hidden from the employee and which defects in construction caused the injury for which the employee sues.

Alamo Oil & Refining Co. *v.* Richards (Texas Civil Appeals), 172 Southwestern, 159, p. 160, January, 1915.

FAILURE OF OPERATOR TO FURNISH MINER SAFE PLACE.

Where the negligence of a coal-mine operator in failing to provide a miner with a reasonably safe place to work or reasonably safe machinery or tools with which to perform the work, is the proximate cause of an injury sustained by the miner, the miner will not be held to have assumed any risk that would not, by the use of ordinary care, have been obvious to a person of ordinary intelligence in a like situation.

Fluhart Collieries Co. *v.* Meets (Kentucky), 169 Southwestern, 686, p. 689, October, 1914.

ELECTRIC WIRES IN HAULAGEWAY.

A miner working in a coal mine assumes the risk of those dangers which he actually knows or of which he ought to have known, but as a matter of law, he is not charged with the assumption of the risk of danger from electric wires hanging in a passageway through which he was required to pass and where there was a gap left in the insulation of the wire and where he came in contact with the wire and received the injury in an attempt to escape from a mule hauling a coal car that came upon him suddenly and unexpectedly, and especially when he testified that he had no knowledge of the defective insulation or covering of the wire.

Hazzard *v.* Consolidated Coal Co. (Michigan), 149 Northwestern, 991, p. 992, December, 1914.

NEGLIGENCE OF OPERATOR NOT ASSUMED.

While a servant or miner by implication agrees that he will undertake the ordinary risks incident to the services in which he is to be engaged, yet he does not assume any risk which may be obviated by the exercise of reasonable care on the master's part, and any failure on the part of a mine operator to observe, for the protection of his miners, that reasonable degree of care which the circumstances of the particular case justly demand, is actionable negligence and is not within the influence of the doctrine of assumed risk.

Darby Coal Mining Co. *v.* Shoop (Virginia), 83 Southeastern, 412, p. 415, November, 1914.

TWO WAYS OF DISCHARGING A DUTY.

The rule requiring a miner or other employee to select the safe or less dangerous way of performing service, does not apply although one way is safer than the other, if the other way is not obviously or necessarily dangerous, and especially if a custom of a mine permits the performance of the service in the more dangerous way.

Southern Steel & Iron Co. *v.* Boston (Alabama), 66 Southern, 684, p. 686, November, 1914.

EFFECT OF PROMISE TO REPAIR.

Assumption of risk is a matter of implied contract and an employee may be held to have assumed a risk, though his own act in proceeding in the face of danger would not constitute negligence on his part; but the employer's promise to repair a defect operates as a suspension of the employee's implied contract to bear the risk, and puts the obligation on the operator to bear the risk during the period covered by his promise. Accordingly where a pit boss promised a miner on Saturday to have a defective track repaired before Monday, the miner on returning to his work on Monday morning was justified in relying upon the promise of the pit boss and in believing that the defect had been repaired as promised.

El Paso County Land & Fuel Co. *v.* Perdaris (Colorado), 147 Pacific, 675, p. 677, April, 1915.

CONTRACTS RELATING TO OPERATIONS.

RECOVERY FOR BREACH OF CONTRACT—APPEAL AND JURISDICTION.

The Court of Appeals of Kentucky has no jurisdiction on an appeal from a judgment for less than $200, a recovery for coal mined by the plaintiff, where the title to the land is not in controversy.

Burk Hollow Coal Co. *v.* Lawson (Kentucky), 169 Southwestern, 695, October, 1914.

PURCHASE OF MINING PROPERTY—RIGHT TO RESCIND FOR FRAUD.

A contract for the sale of mining property may be rescinded on the ground of fraud and misrepresentation where the fraudulent representation consisted in stating that the mine could be operated on a basis of a 20 per cent royalty, when in fact the seller while operating under a 20 per cent royalty with the landlord, was bound by a contract with other parties by which he was compelled to pay an additional 10 per cent royalty, and which fact was fraudulently concealed from the purchaser; and the right to rescind can not be defeated from the fact that the purchaser made an independent investigation and ascertained from the landlord that the royalty was on the 20 per cent basis, when in fact the purchaser had no knowledge as to the additional 10 per cent royalty.

Glass *v.* Templeton (Missouri Appeals), 170 Southwestern, 665, p. 666, November, 1914.

SUIT FOR ROYALTY—EQUITY JURISDICTION.

An action growing out of a controversy over the right to oil royalties is never more than a mere money demand and shows no ground of equity cognizance, for to justify the interposition of a court of equity there must be something more than a mere claim or

demand, there must appear some equity relief to such claim or demand, something remedial to the plaintiff that the law does not give.

Peterson *v.* Smith (West Vriginia), 84 Southeastern, 250, January, 1915.

CONSTRUCTION OF CONTRACT TO MINE COAL—RIGHTS AND LIABILITIES.

A contract to mine coal whereby the mine owner might, in his discretion, control the daily tonnage the miner might remove, and thereby indefinitely prolong the process of removing the coal, is sufficient to impel the conclusion that the contractual intent was for an employment merely, and determinable, without breach, at the will of either party, as otherwise the miner would be obligated to the wholly unreasonable extent of indefinitely holding himself in readiness to mine whenever the mine owner so desired, or to regulate the amount of coal he would remove according to the owner's ungoverned desires; but if the owner's only right was to suspend mining by the miner because there were no orders acceptable to and then accepted by the owner, and there were in fact accepted orders on the part of the owner, and the owner then prevented the miner from mining the coal, this would be a breach of the contract.

Pratt Consolidated Coal Co. *v.* Short (Alabama), 68 Southern, 63, p. 66, February, 1915.

CONTRACTUAL RELATION—VALIDITY OF CONTRACT.

In an action for the breach of a contract to mine coal entered into by a mine owner and a miner, an averment of the contractual right of the miner to mine all the coal, within a reasonable time, in a certain area or territory in the mine of the owner, and the correlative obligation on the owner to accept and pay a stipulated sum per ton for the coal so mined and delivered by the miner at a designated tipple of the owner, is sufficient to show a contractual relation and to relieve the contract of any uncertainty and indefiniteness in respect of right and obligation as would render the contract invalid.

Pratt Consolidated Coal Co. *v.* Short (Alabama), 68 Southern, 63, p. 65, February, 1915.

CONTRACT TO MINE DETERMINABLE AT WILL OF EITHER PARTY.

A contract between a mine owner and an independent contractor by which the latter is given the right to mine, for a stipulated sum per ton, all the coal in a defined area in one of the owner's mine entries, but which contains no provision for the time or period in or during which the right to mine the coal is assured to such contractor, and where it appears that the actual right of the contractor to mine the coal depended upon the condition whether the mine was operated

by the owner, the contract is determinable at the will of either party, and the mine owner is not liable for a breach of the contract.

Christian *v.* Stith Coal Co. (Alabama), 66 Southern, 641, November, 1914.

UNILATERAL CONTRACT—EFFECT OF OPERATIONS.

A contract to mine coal by which the miner was given the exclusive right to mine all the coal in a certain definite territory can not be held void because it is unilateral, and contains no stipulation or promise obligating the miner to mine all the coal in the stated territory, where the miner had proceeded with the work and made an outlay in accordance with the engagement, under the rule that if the party in whose favor a unilateral promise is made accepts it, performs or does any act in recognition of its implied though unexpressed consideration, this supplies the element of mutuality and makes the contract enforceable.

Pratt Consolidated Coal Co. *v.* Short (Alabama), 68 Southern, 63, p. 67, February, 1915.

TIME OF PERFORMANCE—PRESUMPTION.

Where a contract to mine all the coal in a certain area or territory is silent as to the time in which it should be performed by the miner, the law presumes that the parties intended it should be performed by them within a reasonable time.

Pratt Consolidated Coal Co. *v.* Short (Alabama), 68 Southern, 63, p. 67, February, 1915.

CONTRACT WITH BROKERS TO SELL OUTPUT OF MINE.

A contract by which a coal-mining company agreed that certain brokers should have the exclusive sale of its output of coal and coke so long as the services of the brokers were satisfactory and they demonstrated their ability to handle the same and by which the coal company agreed that no one else should quote on its product, and by which the brokers agreed to keep the coal company supplied with orders at good prices, to bill and collect for the coal and coke sold, and to guarantee payment of all accounts, is not lacking in mutuality and the contract is not terminable at the will of either party, and the fact that the coal company made a sale of coal in violation of the terms of the contract was not itself a revocation of the agency and for which the coal company would be liable to the brokers for their commission, and to relieve the coal company of this liability it must give notice of its intention to terminate the contract before it could relieve itself from liability for sales of coal made by it.

Elkhorn Consolidated Coal & Coke Co. *v.* Eaton, Rhodes & Co. (Kentucky), 173 Southwestern, 798, p. 800, March, 1915.

INDEPENDENT CONTRACTOR.

INJURY TO MINER—OPERATOR AN INDEPENDENT CONTRACTOR.

A coal miner who is employed by another miner under contract with the owner and operator of the coal mine must be regarded as a servant of the coal-mine operator to the extent that he is entitled to the protection afforded by statute imposing certain duties upon the coal-mine operator; and the operator can not be permitted to escape liability on the pretense that the alleged employer is an independent contractor.

Lehigh Valley Coal Co. *v.* Yensavage, 218 Fed., 547, p. 552.

LIABILITY OF OPERATOR FOR INJURY TO EMPLOYEE OF THIRD PERSON.

A mine operator owes to a servant or an employee of an independent contractor, mining coal by the ton, the duty of exercising ordinary care to give such employee a reasonably safe place to work, and the mine operator is not relieved from this duty by delegating it to others or to independent contractors; and the negligence of the independent contractor under such circumstances is the negligence of the mine operator and for which it must respond in damages to the injured employee.

Bon Jellico Coal Co. *v.* Murphy (Kentucky), 171 Southwestern, 160, p. 161, December, 1914.

MINE OWNER'S DUTY TO CONTRACTOR'S EMPLOYEES.

A mine owner who employs an independent contractor to operate his mine and who thereby impliedly invites such contractor and his employees to enter and use the mining premises, is liable to them for personal injuries resulting from any condition of the premises which is inherently dangerous, if the contractor and his employees have no knowledge or notice of such condition; but no duty devolves upon the mine owner by reason of this relationship to furnish any part of the equipment necessary or suitable for the operation of the mine, and there is no duty on him to select and install such safety appliances for tracks, trams, or machinery as would render their negligent operation by the contractor or his employees less likely to result in injury to the latter; and in the absence of any agreement to this effect the mine owner owes no duty to an employee of such independent contractor to provide a derailing switch near the mouth of the mine.

Connors Weyman Steel Co. *v.* Kilgore (Alabama), 66 Southern, 609, p. 610, November, 1914.

CONTRACT FOR OPERATING MINE—DUTIES IMPOSED ON OWNER.

Provisions in a contract between a mine owner and an independent contractor for the operation of a mine to the effect that the mining shall be done in accordance with the best methods and with the min-

ing laws of the State, and to the satisfaction of the owner and his engineer, are obviously for the protection of the mine and the mine owner and not for the benefit of employees of such independent contractor, except as they may be operated incidently in that behalf, and does not impose upon the owner the duty of furnishing a particular device to insure the safety of the contractor's employees.

Connors Weyman Steel Co. *v.* Kilgore (Alabama), 66 Southern, 609, p. 611, November, 1914.

MASTER AND SERVANT—EMPLOYEE OF INDEPENDENT CONTRACTOR.

Where a head miner, as is common, employed assistants and helpers, who stand in the same relation to the mine owner and operator and the mine boss as the head miner stands, it is the duty of the mine owner and operator to protect such helpers in every way and to the same extent as he should protect the head miner; but the head miner or workman in such case is not an independent contractor, but a servant whose position depends on the amount of coal he gets out and in such case the amount paid his helpers by him is taken out of his pay, and where both are subject to the control of the mine owner and operator they are equally his servants.

Borderland Coal Co. *v.* Small (Kentucky), 170 Southwestern, 8, p. 9, November, 1914.

PARTNERSHIP AGREEMENTS.

MINING PARTNERSHIPS—WHAT CONSTITUTES.

A mining partnership exists where the several owners of a mine cooperate in the working of a mine; and a mining partnership may exist as well where the parties have a common interest merely in the working of a mine or in carrying on mining operations as where they own the mine itself; and when two or more persons acquire mining properties solely or principally for the purpose of extracting ores, in the absence of an express intention to enter into joint commercial partnership in the operation of a mine, the relation existing between them in the transaction of other common business is a mining partnership.

Lamont *v.* Reynolds (Colorado), 144 Pacific, 1131, December, 1914.

PROMOTERS NOT PARTNERS.

The fact that two persons joined with others as promoters in the organization of a corporation to purchase mines and mining properties and the fact that two of them subsequently executed a declaration of trust by which they joined their holdings of stocks and bonds, is not sufficient to constitute a partnership authorizing one to bind the other by contract or to make one liable to account to the other for profits received.

Ringolsky *v.* Maul L. Mining Co. (Missouri), 171 Southwestern, 56, p. 59, December, 1914.

OPERATING LEASE BY JOINT OWNERS.

Joint owners of an oil and gas lease who worked the lease together though not under any special agreement, are partners, and as such they are subject to the jurisdiction of equity; but a sale or an assignment by one member of his interest in the lease does not terminate a mining partnership; and a deed of trust by one such partner on his share operates as a sale to the trustee, but it does not constitute the trustee a member of the partnership.

Wetzel *v.* Jones (West Virginia), 84 Southeastern, 951, p. 952, April, 1915.

DISSOLUTION AND TERMINATION OF LIABILITY.

An agreement by and among three lessees of mining property to work and operate a mine under and in pursuance of the lease is sufficient to create a mining partnership in its narrowest and most technical sense; but such a partnership terminates when any one of the lessees ceases to work or aid in the working of the mine, and the other lessees thereafter have no authority to operate the mine in behalf or at the expense of the lessee who has positively withdrawn from the operation of the mine.

Lamont *v.* Reynolds (Colorado), 144 Pacific, 1131, p. 1132, December, 1914.

METHODS OF OPERATING.

MINING COAL NOT INTERSTATE COMMERCE.

The mere act of mining coal is not interstate commerce.

Delaware, etc., R. Co. *v.* Yurkonis, 220 Fed., 429, p. 433, January, 1915.

LABOR ORGANIZATIONS.

RELATION OF CAPITAL AND LABOR.

The industrial development of the world within the last half century has been such as to render it necessary for the courts to take a broader and more comprehensive view than formerly of questions pertaining to the relation that capital sustains to labor.

Mitchell *v.* Hitchman Coal & Coke Co., 214, Fed., 685, p. 698.

LABOR UNIONS LAWFUL.

Some expressions in the earlier English cases indicate that labor unions in England were formerly regarded as unlawful and this rule was applied especially to labor unions formed for the purpose of securing a higher rate of wages, and they were regarded by the English courts as criminal conspiracies; but this rule has never been recognized by the courts of the United States and the rule throughout this

country is that labor may organize for its own protection and to further the interests of the laboring classes, and laborers may "strike" and persuade and induce others to join them. It is only when such a union of laborers resorts to unlawful means to cause injuries to others, to whom they have no relation, contractually or otherwise, the limit permitted by law is passed and they may be restrained.

Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed., 685, p. 697.
Bittner *v.* West Virginia-Pittsburgh Coal Co., 214 Fed., 716, 717.

RELATIVE RIGHTS OF OPERATORS AND MINERS—CONTROVERSIES SETTLED BY COURTS.

So long as capital employs legitimate means for the protection of property rights, it is to be accorded the protection of the law; but this does not mean that capital may, by improper methods, form combinations for the purpose of preventing labor from organizing for mutual protection; and laboring men have the right to use peaceable and lawful methods and unite their forces in order to improve their condition as respects their ability to earn a decent living, give their children moral and intellectual training and secure the enactment of legislation requiring mine owners to adopt such methods as may be necessary to keep their mines in a sanitary condition; and likewise to adopt methods to minimize, as much as possible, the occurrence of the awful catastrophes by which so many human lives have been lost; and when a controversy arises between labor and capital the use of dynamite or any other unlawful methods on the part of the representatives of labor, whereby property and human lives are destroyed, is not to be tolerated by the courts. The relative rights of the parties in all such controversies are entitled to equal consideration and controversies between mine employers and labor unions will be dealt with in the same spirit that actuates the courts in adjusting differences between individuals in questions affecting ordinary transactions; and until it is provided by legislation that labor disputes shall be settled by arbitration the courts must determine all controversies of this character, and as the law now exists, when property or personal rights are involved, the courts alone can furnish adequate relief.

Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed., 685, p. 715.

COAL MINERS—FOREIGNERS PROTECTED—UNITED MINE WORKERS.

A large percentage of the million or more foreigners landing on our shores annually are employed as miners, and while vast numbers of them are unable to read and write or understand the English language, they believe they can secure a more substantial recognition of their rights as members of a labor union; and so long as they are here for the purpose of earning a living and improving their condi-

tion, and at the same time adding to the wealth of the country, it is the duty of the Government to afford them equal protection under the Constitution; and there is nothing in the national constitution of the United Mine Workers of America or in the rules of this organization that binds a member contrary to his wishes or prevents him from exercising his own free will; nor has the union arbitrary power, by violence, intimidation, or otherwise, to compel a miner to become a member of the organization; nor do the rules of the organization control or abrogate or destroy the right of an employer to contract with the members independent of the organization, and this as well as similar organizations may use all lawful methods for the purpose of inducing others to join its order, and, until the contrary appears, it must be assumed that only lawful methods are to be employed for the accomplishment of such purpose.

Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed., 685, pp. 699–702.

UNLAWFUL ACTS OF LABOR UNIONS.

If the United Mine Workers of America in any instance resort to coercion, threats, intimidation, or violence for the purpose of preventing a mine owner from employing nonunion men, such conduct would be unlawful, and the courts would promptly restrain anyone who might be a party to such transaction; and it would always be unlawful for an individual to undertake, by coercion, intimidation, or threats, to prevent a mine owner from exercising his own free will as to the employment of nonunion laborers, or as to any other thing which he might deem necessary to be done in order to protect his property rights.

Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed., 685, p. 703.

PREVENTING OPERATIONS—INJUNCTIONS.

STRIKING MINERS—VIOLATIONS OF INJUNCTION.

It is a violation of an injunction issued to restrain miners from committing any violence against the property and nonunion employees of a mining company where a miners' union and its members continue to threaten assaults, fire shots into the mine inclosure, and throw stones at the employees, and where it was made necessary by reason of the threats and intimidation of the strikers to have the mine guarded by United States marshals and guards were required to accompany employees sent to purchase supplies, and where language was used and conduct continued intended to incite strikers and others to a violation of the restraining order.

United States *v.* Colo., 216 Fed., 654, p. 656.

INTERFERENCE WITH WATER MAINS ENJOINED.

Where there is a statutory right to lay a water pipe line from a watercourse over certain reservations to mining operations on leased premises, and where after opening one mine and laying one pipe line by the lessee it is found impracticable, on account of mining conditions at that point, to successfully and profitably mine coal, and to perform the covenants of the lease to use the best and most improved methods and to pay the rent and royalties reserved, it accordingly becomes necessary to abandon such operations, locate a new mine and lay a new water line thereto across the reserved lands, and when such new plant and water line have been so located and laid at great expense and used and operated for two years or more without interference by the lessor, equity will enjoin the lessor from thereafter interfering therewith as well as from prosecuting suits for damages for the maintenance of such new water line.

Mary Helen Coal Co. *v.* Hatfield (West Virginia), 83 Southeastern, 292, November, 1914.

MINE OPERATOR LIABLE FOR NUISANCE.

A mine owner operating his coal mine on or near the banks of a creek, and who in pursuit of the business of mining has erected a number of tenant houses, stables, and outhouses, together with slaughter pens where cattle are killed and dressed, and where all the refuse and filth from these various establishments fall into or are washed into the waters of the creek and carried down upon or along the lands of a lower riparian owner, may be liable in damages to such lower riparian owner for maintaining a nuisance.

Stouts Mountain Coal & Coke Co. *v.* Tedder (Alabama), 66 Southern, 619, November, 1914.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION OF NOTE AND MINING LEASE—RATE OF INTEREST.

A note given in part payment for the purchase of mining property may be construed in connection with a mining lease executed at the same time for the purpose of determining the rate of interest on the note.

Boswell *v.* Big Vein Pocahontas Coal Co., 217 Fed., 822, p. 823, November, 1914.

LEASE AS A SALE.

A lease of mines is not in reality a lease in the sense of an agricultural lease, as there is not sowing and reaping, and in the ordinary sense of the term there are no periodical harvests; but what is called

a mineral lease is really, when properly considered, a sale out and out of a portion of the land.

Von Baumbach *v.* Sargent Land Co., 219 Fed., 31, p. 38.

LESSEE LIABLE TO LESSOR FOR COMMISSION FOR OBTAINING LEASE.

The owner of mineral lands is entitled to an accounting and to recover from a person who induced him to execute a mining lease under certain stated terms, on the false and fraudulent representations that the lessee had arranged to transfer and assign the lease to a third person for a stipulated sum, and where the lessee agreed to pay such owner, as an additional inducement to execute the lease, a stipulated part of the sum so to be received by him in consideration of the assignment of the lease, and where the sum stated by the lessee to be received by him for the assignment of the lease, was in fact much less than the actual sum he did subsequently receive for the assignment of the lease.

Expansion Realty Co. *v.* Geren (Missouri Appeals), 170 Southwestern, 928, p. 923, November, 1914.

NATURE AND CONSTRUCTION—RIGHTS OF LESSOR AND LESSEE.

A lease by which the lessee is authorized to explore for, mine, and remove the merchantable iron ore which may be found in or upon the land, and to construct buildings, make excavations, openings, drains, roads, and other improvements thereon, suitable for mining and removing the iron ore, with the privilege of cutting and using timber from the leased premises for carrying on mining operations, with provisions for the payment of the ore mined and giving the lessor a lien upon all ore taken from the mine and upon all improvements as security for the payment of the royalties for ore mined, confers upon the lessee the right to explore for, remove, and transport to market all iron ore found therein, and such additional rights and possession of the control of the premises as are necessary to the proper conduct of the mining operations; but the lessor as owner of the fee retains the right of possession of the surface of the land and can maintain an action against third persons entering thereon without right or authority from him.

Howell *v.* Cuyuna Northern Railway Co. (Minnesota), 149 Northwestern, 942, December, 1914.

TERMINATION OF LEASE—PROOF OF CUSTOM.

Under a mining lease by which the lessee obligated himself to work the mine property as steadily and continuously during the term as the weather and seasons of the year would permit, the lessee can not, in an action by the lessor for rent due, prove a custom among miners

by which lessees under such leases are permitted and have the right to cease working under the lease and remove from the leased premises whenever they choose so to do, as proof of such a custom would impair the lessor's right to recover rent provided for, and further for the reason that the terms of such a lease as to the time of operation are plain and such a lease can not be varied by evidence of usage, as such proof can be shown only when the terms of a lease are obscure or uncertain and the lessee was bound to continue the work as steadily and as continuously from the date of the lease as the weather and seasons of each year would permit during the entire term of the lease.

Northern Light Mining Co. *v.* Blue Goose Mining Co. (California), 143 Pacific, 540, p. 542.

LESSEE'S RIGHT TO CONSTRUCT RAILROAD ON SURFACE.

A lessee under a mining lease authorizing him to construct all buildings, make all excavations, openings, drains, railroads, wagon roads, and other improvements, on the leased premises suitable for the mining and removing of iron ore and granting such other facilities as may be necessary to a successful operation of a mine, has no right to authorize the construction of a railroad upon the leased premises, except for the purpose of aiding in the mining operations and the transportation of ore to market.

Howell *v.* Cuyuna Northern Railway Co. (Minnesota), 149 Northwestern, 942, p. 943, December, 1914.

MINING LEASE—USE OF SURFACE—VALIDITY.

A mining lease for a period of 50 years executed for the purpose of conferring upon the lessee the right to mine iron ore in and from the land described, with permission to erect buildings, put in engines and machinery, build, or authorize to be built, roads, including railroads and switches, for the purposes of transporting supplies to any mine on the property and transporting ore therefrom, and to do all such other things as may be necessary or convenient for the carrying on of iron-ore mining on the premises described, is valid though the surface of the land is used for agricultural purposes, and does not contravene the constitutional provision that "no lease or grant of agricultural lands for longer than 12 years, reserving any rent or surface, shall be valid."

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 250, April, 1915.

OPTION AGREEMENT TO LEASE—EFFECT AND CONSTRUCTION.

An option agreement giving the leasing party the right to demand and receive a mining lease at any time within one year upon the condition that the lessee would commence within a stated period, and

continue in a manner specified, the exploration of the property until a demand for a lease or abandonment of the option, obligates the optionor to execute and deliver a lease on demand, whether, when such demand was made, ore was discovered or not, on the sole condition that up to the time of such demand the optionee kept the option alive by commencing and continuing the required exploratory work; and the optionor can not be heard to say he was induced to execute the lease upon a misrepresentation of a certain fact, when he was bound by his contract to execute the lease whether the fact alleged to have been represented was true or otherwise.

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 245, April, 1915.

COVENANT TO EXPLORE AND DEVELOP NOT IMPLIED.

A lease providing that all mines of iron ore on the premises described shall be opened, used, and worked in such manner as is usual and customary in successful mining operations of similar character when conducted by the proprietors themselves, and so as not to do or permit any unnecessary or unusual injury to the same, or inconvenience or hindrance in the subsequent operations of any mine or mines on the leased premises, the lessee not to remove or impair any support, timber, framework, shafts, tramsways necessary or convenient for the use or maintenance of such mines, and providing that the earth and rocks taken from the mine shall be dumped in such places as not to interfere with the convenient working of any mine or mines, does not require the lessee to open, use, or work a mine; but it rather fixes and settles the manner in which the lessee shall open, use, and work a mine, the object being to prevent a waste of ore and unapproved methods of mining, and to compel the lessee to leave the mine on its surrender in a good, safe, workmanlike condition; and the court can not under the statute of Michigan, which provides that no covenant shall be implied in any conveyance of real estate, whether the conveyance contains special covenants or not, create a covenant by implication in the lease and impose on the lessee an obligation to operate the mine or make thorough exploration to determine whether the leased premises contain ore or not.

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 247, April, 1915.

RIGHT TO REMOVE ORE MINED.

A lease executed under an option providing for a lease for mining purposes and removing iron ore from the described premises, and which confers upon the lessee the right to mine and provides for the payment of royalty on all ore mined and removed from the premises, and provides that the lessee shall pay a stipulated sum each year if

he fails to mine and remove less than a stated amount each year, clearly discloses an intention on the part of both parties to include in the lease the right of removal of the iron ore mined.

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 249, April, 1915.

CONSTRUCTION—DIAMOND LEASE—FRAUD.

A mine owner and lessor of a diamond mine can not recover the possession of diamonds from the lessee, mined by him from the leased mine, on the ground that the lease was procured for the fraudulent purpose of discrediting the mine and to keep the lessor ignorant as to the value of the large diamonds discovered, to stifle the business of mining, to depress the value of the mine, and to buy it for a minimum price, unless he proves by a fair preponderance of evidence the fraudulent acts alleged by him and that the lease was procured for the fraudulent purposes alleged and that the diamonds were in fact mined with the false and fraudulent intent as averred.

Mauney *v.* Millar (Arkansas), 175 Southwestern, 402, March, 1915.

ROYALTIES.

Royalty is a certain percentage or proportion specifically stated or on a graduated scale according to the value of the ore, based on either the net proceeds, smelter returns, mill returns, or returns evidenced by the certificate of the United States assay office, or otherwise, as the parties agree upon.

Saulsberry *v.* Saulsberry (Kentucky), 172 Southwestern, 932, February, 1915.

RECOVERY OF RENT OR ROYALTY.

In an action on a lease by which the lessee agreed to work certain mines in mine fashion and pay a certain stipulated rent or royalties, the amount depending on the amount of mineral mined, the royalties to be paid annually in gold or precious minerals extracted from the premises, no allegation of a demand for the payment of the rent is essential though no particular day was designated for payment; but the precise time and whether made in one or more installments was left to the discretion of the lessee, but in any event the entire amount of annual rent would be due at the end of the year, and if not paid an action would then lie for its recovery, whether the payment was to be made in gold dust, bullion, mineral or money.

Northern Light Mining Co. *v.* Blue Goose Mining Co. (California), 143 Pacific, 540, p. 542.

RIGHT TO ROYALTIES FROM SUBLEASE—TRANSFER BY BANKRUPT.

An owner of an undivided interest in a mining claim leased his coowner's interest and agreed by the terms of the lease to work the entire claim, and thereafter sublet the claim to another reserving to

himself a percentage of the gross output, and then conveyed his undivided interest in the claim to his wife and subsequently became a bankrupt. In a contest between the trustee of the estate of the bankrupt and the bankrupt's wife, the latter was not permitted to retain all the royalties reserved in such sublease as against the trustee in bankruptcy.

Stroecker *v.* Patterson, 220 Fed., 21, February, 1915.

FORFEITURE—EFFECT ON ROYALTIES NOT DUE.

A forfeiture of a mining lease by the lessor and a reentry by him between rental periods, releases the lessee from liability for all rents not fully accrued at the time of such forfeiture and reentry.

G. W. Young's Mining Co. *v.* Courtney, 219 Fed., 868, p. 871.

ARBITRARY FORFEITURE—EQUITABLE RELIEF DENIED.

A lessor of a mining lease who has arbitrarily declared a forfeiture of the lease and who has reentered and taken possession of the leased premises, will not be granted equitable relief and can not have an equitable lien declared upon the lessee's personal property for royalty due, where the lessee had not produced sufficient ore in the current year to entitle him to a setoff for the excess of royalties paid; but where having a contingent right thereto, it would have been available but for the arbitrary forfeiture of the lease.

G. W. Young's Mining Co., 219 Fed., 868, p. 872.

FORFEITURE—BREACH OF IMPLIED COVENANT.

Where the right of forfeiture in a mining lease is confined to the failure of the lessee respecting the covenants and conditions which are expressed in the lease, and does not arise upon the nonobservance of an implied covenant or condition, the lessor can not claim the right to forfeit the lease because of the failure of the lessee to perform an implied covenant.

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 249, April, 1915.

AVOIDANCE FOR FRAUD—KNOWLEDGE OF FACTS.

To entitle a lessor of a mining lease to cancel and avoid the same on the ground that he was induced to enter into it upon the faith of unwarranted representations, it is essential that he should be ignorant of the matters represented; and if before he executed the lease he had knowledge of the truth and knew that the statements made by the lessee and incorporated in the lease itself were not true, he can not claim to have been deceived; and where the mining lease recites that the lessee had explored the premises and represents that there

exists thereon iron ore in paying quantities, if the lessor was well informed of the results of the exploratory work, and knew that iron ore in quantity and quality sufficient to warrant opening up and mining the same had not been discovered, he can not claim to have been defrauded by the representation.

De Grasse *v.* Verona Mining Co. (Michigan), 152 Northwestern, 242, p. 244, April, 1915.

COAL LEASES.

PRACTICAL CONSTRUCTION.

A court will not construe a coal lease, though somewhat ambiguous, where the parties themselves continued payment of royalties for a period of three years after the death of the lessor, and thereby placed their own construction upon the lease with reference to the time and method of making payment of royalties.

Prudence Coal Co. *v.* Perkins, 217 Fed., 569, p. 574.

CONTRACT AS A SALE AND NOT A LEASE—FORFEITURE AND CANCELLATION.

A contract, denominated a lease, by which the lessee named was given the exclusive right to mine and remove within a stated period all of a certain vein of coal underlying certain tracts of land, providing that the lease was in gross and not by acreage and reciting that it sold outright and transferred to the lessee a mining plant and certain property and machinery used in connection therewith, for a stipulated consideration, payable in different amounts at stated dates, and providing also for the payment of a "long-ton royalty of 15 cents to be paid for the coal mined and removed," and providing further that the royalty should for the first three years amount each year to a stipulated sum payable in quarterly installments and that thereafter it should amount to another stated sum payable in quarterly installments, conditioned that the lessor could forfeit the lease on failure of the lessee to keep and perform its terms and conditions, is in fact a mining lease and not a sale of either land or coal by the acre, nor of any fixed quantity or number of tons, but a right in gross to mine and remove all the coal in the particular vein described; and the stated sum, aside from the royalty named and so much of the sum named as a consideration as was in excess of the value of the mining plant and the property connected therewith, must be regarded as a bonus for the privilege of mining the coal on which the royalty was to be paid; and such a lease may at the instance of the lessor be canceled as a cloud on the title on failure of the lessee to operate.

Browning *v.* Boswell, 215 Fed., 826, p. 834.
See Boswell *v.* Big Vein Pocahontas Coal Co., 217 Fed., 822.

LEASE OF SEPARATE TRACTS—TIME LIMIT TO EACH—ENTIRE CONTRACT.

A coal lease by which the lessor grants to the lessee the right to mine the coal from under several separate tracts and parcels of land at stipulated royalties to be paid at certain stated times, the period of duration of the lease being different as to different tracts of the land leased, the lease containing an obligation on the part of the lessee to mine the coal from under the tract where the time limit is the least, at the earliest moment practicable, so that the coal may all be mined before the time limit expires, is an entire contract, and indicates no purpose or intent to give the lessee a right to avail himself of some of its provisions and at the same time abandon other portions of the lease; and if the lessee desires to avail himself of the provisions of the lease he must proceed without unreasonable delay to mine the coal from under the land where the time limit is the least, and if possible to have the coal mined from such land before the time limit expires; and on the failure of the lessee to proceed under the lease and begin to mine coal until the time limit of some of the tracts had expired, this works a forfeiture of the entire lease at the option of the lessor.

Ray Coal Mining Co. *v.* Ross (Iowa), 151 Northwestern, 63, February, 1915.

SPECIFIC PERFORMANCE NOT DECREED.

A court of equity has no power to decree specific performance of a mining lease or to compel the lessee to mine and remove the coal, nor can the court divide up and abate in part an indivisible right to buy the mine or remove the coal, but the only remedy for the defrauded party is to have the lease canceled.

Browning *v.* Boswell, 215 Fed., 826, p. 836.

IMPLIED SURRENDER.

An implied surrender of a coal lease does not arise from mere notice of intention on the part of the lessee not to pay further rentals and to give up the lease, and his failure to make such payments; but where there is an abandonment of actual operations under a lease, and the lessor reenters or executes another lease, these circumstances establish an implied surrender.

Laing *v.* Price (West Virginia), 83 Southeastern, 497, p. 499, October, 1914.

COVENANT TO PAY MINIMUM RENTAL—RELIEF.

A covenant in a coal lease to pay fixed or minimum rentals is ordinarily absolute and enforceable; and while such covenants are sometimes relieved against as in case of leasing unknown and undeveloped territory, or where there are terms of express or implied warranty,

or where the parties are mutually mistaken as to the existence of mineral, yet a lessee can not avoid his absolute promise to pay a minimum rental where there has been no real effort on his part to determine whether any of the veins of coal are susceptible of advantageous mining, where no entry has ever been driven, no shaft sunk on the premises, or ore taken from the land, and where it appears that coal seams actually exist in the leased premises at a thickness of at least 3 feet and a very considerable vein of coal runs through the leased premises.

Laing *v.* Price (West Virginia), 83 Southeastern, 497, p. 499, October, 1914.

CONSTRUCTION—PAYMENT OF ROYALTIES.

An agreement in a coal lease to the effect that the lessee may continue to mine the coal from the leased premises, paying the lessor at the rate of 25 cents per ton for his portion of the coal so mined, agreeing to other established usage and practice, does not authorize the lessee to pay royalty only on coal that passed over a $\frac{5}{8}$-inch mesh and to appropriate all the smaller sizes that passed through such mesh without paying any royalty thereon.

Gerard Trust Co. *v.* Delaware & Hudson Co. (Pennsylvania), 92 Atlantic, 129, p. 130, July, 1914.

ACTION FOR ROYALTIES—DEFENSE.

In an action by a lessor against the lessee under a coal lease for royalties for coal mined under such lease, it is no defense to the action for the lessee to aver that at the time of the execution of the lease the lessor did not have title to the leased premises, in the absence of an allegation of fraud, accident, or mistake in the execution of the lease, where it is not averred that the lessee had been evicted from or had surrendered the possession of the tract, or that the lessor warranted the title.

Lazarus *v.* Lehigh & Wilkes-Barre Coal Co. (Pennsylvania), 92 Atlantic, 121, p. 123, July, 1914.

LESSEE MAY COMPEL ADJUSTMENT OF ROYALTIES.

Under a coal lease executed by an agent for heirs where there is a subsequent controversy as to the persons who were entitled to royalties under the lease, the lessee may bring a suit against all the parties claiming any interest in the royalties under the lease, and tender or pay the amount due from him under the lease and compel the other parties to determine their rights to the royalties thus paid or tendered.

Wilmer *v.* Philadelphia, etc., Coal & Iron Co. (Maryland), 93 Atlantic, 157, January, 1915.

ROYALTY—RENT AND ROYALTY SYNONYMOUS.

The word "royalty" as employed in a coal-mining lease means a share of the profit reserved by the owner for permitting the removal of the coal and is in the nature of rent; and while it may be conceded that royalty is a mere property rent where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine, yet it can not be doubted that the terms "rent" and "royalty" as the result of usage and custom are often used interchangeably, and accordingly mining leases are made every day where the term "rent" is employed, even though it may as a matter of fact assume the form of royalties.

Saulsberry *v.* Saulsberry (Kentucky), 172 Southwestern, 932, p. 933, February, 1915.

RENTS.

Rent is defined as something given by way of compensation to a lessor for the right to make use of land demised, and when applied to coal lands and leases it means the profit or return reserved, payable periodically, but not necessarily immediately, if it issues from period to period, during the whole continuance of the grantee's estate, whether from year to year, or from month to month.

Saulsberry *v.* Saulsberry (Kentucky), 172 Southwestern, 932, p. 933, February, 1915.

AGREEMENT TO MINE COAL AND PAY ROYALTY—EFFECT AS A LEASE.

An agreement to the effect that the second party may continue to mine the coal from the land held in common by the first and second parties, paying the first party at the rate of 25 cents per ton for his portion of the coal mined, does not constitute a sale of the coal in place, or a conditional sale of the coal in place, but does create the relation of landlord and tenant.

Gerard Trust Co. *v.* Delaware & Hudson Co. (Pennsylvania), 92 Atlantic, 129, p. 130, July, 1914.

OIL AND GAS LEASES.

CONSTRUCTION AND CONSIDERATION—CONTRACT FOR OPTION.

An oil lease by which the lessee has the right to bore for oil or pay a small quarterly rental, or to surrender the lease at any time upon the payment of a mere nominal sum to the lessor, is based on a mere nominal consideration and does not pass an interest in the land and is a mere contract for an option by which the lessee may acquire an interest in the land.

Owens *v.* Corsicana Petroleum Co. (Texas Appeals), 169 Southwestern, 192, p. 194, June, 1914.

CONSTRUCTION—RIGHTS AND DUTIES OF LESSEE.

A different rule is applied to oil leases from that applied to ordinary leases, and leases of land for the purpose of being prospected and developed for oil are construed most favorable for the lessor; and a lessee under such a lease, in order to maintain his rights, must begin within a reasonable time the performance of obligations imposed upon him by the lease and continue in the performance thereof with reasonable diligence, as the discovery and production of oil is a condition precedent to the continuance or vesting any estate in the demised premises; and where the only real consideration is propective royalty to come from exploration and development, a failure on the part of the lessee to develop the premises renders the agreement a mere nudum pactum and works a forfeiture of the lease. Such a lease may be forfeited at the option of the lessor where the lessee has not only failed to develop the premises demised, but especially so where he has leased the adjoining premises and has drilled wells near the line of the leased premises thereby robbing the lessor of his due share of the underlying oil.

Owens *v.* Corsicana Petroleum Co. (Texas Appeals), 169 Southwestern, 192, p. 198, June, 1914.

JURISDICTION OF COURT TO MODIFY OR CANCEL.

A county court of Oklahoma is without jurisdiction to entertain a petition of a lessor in an oil and gas lease to modify and cancel the same, where such lease was executed by the former guardian of the petitioner on the order of a proper court and approved by the Secretary of the Interior.

Ozark Oil Co. *v.* Berryhill (Oklahoma), 143 Pacific, 173.

INDIAN LEASE—CONDITIONS PRECEDENT—APPROVAL BY SECRETARY.

Provisions in an order of court authorizing a guardian of an Indian to join with the latter in the execution of an oil and gas mining lease on the allotment of such Indian, and providing that the lease should be subject to the approval of the Secretary of the Interior and should be executed in accordance with the rules and regulations prescribed by him, and directing the guardian to make a full report when the order had been complied with, and directing that a stipulated bonus should be placed in escrow in a certain designated bank until the Secretary had approved the lease, can not be considered as idle and useless provisions, but they must be taken as having a fixed and set purpose understood by the court and the parties; and the provision requiring the approval of the Secretary of the Interior was a condition precedent to be complied with in order to complete the execution of the lease contract, and not having been complied with the

contract was not completed and no estate vested in the lessee under the lease.

Wellsville Oil Co. *v.* Miller (Oklahoma), 145 Pacific, 344, p. 348, December, 1914.

RIGHTS TO USE OF SURFACE—LOCATION OF WELLS.

The lessee and lessor under an oil and gas lease are both in possession of the surface and each, in the exercise of his right therein and thereon, is in duty bound to have due regard for the rights of the other; and the lessee in exercising his rights under such a lease owes the duty to the lessor to not unnecessarily, carelessly, or wantonly injure him in the proper use of the surface; and in choosing between two locations for drilling a well equally available to him, the lessee is bound to choose the one to do the least injury to the lessor, and he is not at liberty to choose locations for the drilling of wells in utter disregard of the rights of the lessor. Likewise the lessor in the use of the surface for any available purposes is in duty bound to exercise reasonable care not to interfere with, injure, or annoy the lessee in drilling and operating his oil wells, and under such circumstances each is bound to use his own so as not to injure the rights of the other.

Gillespie *v.* American Zinc & Chemical Co. (Pennsylvania), 93 Atlantic, 272, p. 273, January, 1914.

PRIOR RECORDED LEASE AS NOTICE.

A lessee of oil lands is to be charged with notice of a prior recorded lease and proof of prior oral negotiations as to what lands the lessor was leasing to the lessee or how much land the lessee thought he was leasing is immaterial, as the rights of the parties are to be determined by the lease itself.

Loeb *v.* Conley (Kentucky), 169 Southwestern, 575, p. 578, October, 1914.

EFFECT OF RECORD.

The fact that an oil lease is void for want of mutuality does not affect its recordability and when recorded it must operate as notice to a subsequent lessee.

Loeb *v.* Conley (Kentucky), 169 Southwestern, 575, p. 578, October, 1914.

LEASE VALID WITHOUT RECORDING—TITLE TO OIL AND GAS.

A lease demising and granting the oil and gas and other minerals in a tract of land for a term of years and for as much longer time as oil and gas and other minerals are found in paying quantities thereon, the lessee to pay the lessor a stipulated royalty on all oil and gas produced, the lease binding the lessee to commence a well within 60 days, but containing no obligation requiring the lessee to prosecute

mining operations further, does not transfer the title to the oil and gas or to other minerals, and the lease was not required to be recorded or listed for taxation in order to be valid.

Finch *v.* Beyer (Kansas), 146 Pacific, 1141, p. 1142, March, 1915.

ROYALTIES.

The word "royalty" as used in an oil and gas lease, generally refers to a share of the product or profit reserved by the owner for permitting another to use the property.

Saulsberry *v.* Saulsberry (Kentucky), 172 Southwestern, 932, p. 933, February, 1915.

DEVELOPMENT IMPLIED—DILIGENCE REQUIRED IN OPERATION.

A lessee under a lease for the production of oil and gas, containing the usual terms and conditions, must, if either oil or gas is found in paying quantities, exercise due and reasonable diligence in prosecuting operations under the lease for the mutual benefit of himself and his lessor; and if he unreasonably fails or refuses so to do, damages therefor may be recovered against him in an appropriate action at law. But the judgment of the lessee as to the diligence with which and extent to which wells should be drilled under the lease, upon discovery of either oil or gas in paying quantities, will control, if exercised in good faith and not unreasonably or arbitrarily to promote his own peculiar benefit to the manifest prejudice of the lessor; and both lessee and lessor are bound by that degree of diligence which, surrounding circumstances and conditions being considered, would reasonably be expected of operators of ordinary prudence, experience, and engaged in the same business, having due regard for the interests and advantage of themselves and their lessors.

Grass *v.* Big Creek Development Co. (West Virginia), 84 Southeastern, 750, p. 752, March, 1915.

IMPLIED COVENANT TO DEVELOP.

In oil and gas leases generally there is an implied covenant on the part of the lessee to begin operations within a reasonable time, and on failure to do so he will be presumed to have abandoned his rights, and a court of equity will at the suit of the lessor cancel the lease as constituting a cloud upon the title.

Horse Creek Coal Land Co. *v.* Trees (West Virginia), 84 Southeastern, 376, p. 378, February, 1915.

It is an implied condition or covenant of every lease of land for the production of oil therefrom that when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both the lessor and the lessee.

Highfield Co. *v.* Kirk (Pennsylvania), 93 Atlantic, 815, p. 817, January, 1915.

EXCESSIVE OPERATION AS A BREACH.

A plain and substantial disregard of the duty of an oil lessee to operate the lease in such a manner as would be reasonably expected of operators of ordinary prudence, having regard to the interests of both the lessor and lessee, would be a breach of the lease; and the obligation to develop premises held under an oil lease might be a violation as much by a too strenuous as by a too dilatory operation of the lease, and such a method of operating an oil lease can not be made the basis of an equitable right to compel the execution of a new lease.

Wellsville Oil Co. *v.* Miller (Oklahoma), 145 Pacific, 344, p. 347, December, 1914.

UNILATERAL LEASE—RIGHTS OF LESSEE—FAILURE TO DEVELOP.

An oil lease based upon a mere nominal consideration, leaving it optional with the lessee to bore for oil or to pay a small quarterly rental, is unilateral and void, unless the lessor accepts the rents at the expiration of each quarterly period and thereby agrees to continue the option for three months longer; and the lessee under such a lease has no right that can be enforced, in the absence of a showing that he had in good faith attempted to explore for oil. Such a lease can not be construed so as to enable a lessee to hold it merely for speculative purposes without doing what he stipulated to do and what was clearly in contemplation of the lessor when he executed the lease.

Owens *v.* Corsicana Petroleum Co. (Texas App.), 169 Southwestern, 192, p. 194. June, 1914.

LIABILITY OF LESSEE FOR GAS WELLS.

An oil and gas lease providing that the lessee shall deliver to the credit of the lessor free of cost in a pipe line, one-eighth part of all the oil produced and saved from the leased premises and pay $300 per year for the gas from each and every gas well drilled on the premises, must be interpreted in the light of all the facts and circumstances surrounding the parties, their relation to each other, the objects and purposes of entering into the contract, and the term "gas well" as used in the contract must be taken to mean a gas well, which, considering its location with reference to any market for gas, its capacity as a gas producer, that it can be profitably operated as such, and not a well producing oil in large quantities and some gas and operated by the lessee for many years as an oil well, and without demand for gas rental by the lessor; and the fact that some gas is found in a well and is run from the casing head into a gas line from wells on an adjoining lease by the lessee, and the gas from all utilized in operating the wells on both properties, according to a custom

prevailing among oil operators, does not impose a liability on the lessee.

Prichard *v.* Freeland Oil Co. (West Virginia), 84 Southeastern, 945, p. 946, April, 1915.
Locke *v.* Russell (West Virginia), 84 Southeastern, 948, p. 950, April, 1915.

PRODUCING WELLS—COLLECTING GASOLINE AS EVIDENCE OF GAS.

The fact that the lessee of an oil and gas lease who had drilled and was operating oil wells, installed and connected vacuum pumps in connection with such wells for the purpose of increasing the production thereof, and the further fact that the lessee successfully utilized what was called or termed "vapor," which was emitted from the wells at the casing head, and by process of distillation and compression converted the escaping substance into gasoline for the mutual advantage and benefit of the lessee and lessor, did not thereby render the lessee liable for the annual rental of gas wells, under the terms of the lease, as the mere collecting of the vapor or volatile substance and the manufacture of gasoline therefrom was no indication of proof of gas in the wells, and did not bring them within the terms of the lease as producing gas wells.

Locke *v.* Russell (West Virginia), 84 Southeastern, 948, p. 949, April, 1915.

DAMAGES FOR FAILURE TO DEVELOP.

A lessor of oil lands for the production of oil and gas in an action against the lessee for failure to properly develop the leased premises is entitled only to such damages as he sustained by any failure on the part of the lessee to exercise an honest judgment in proceeding with the necessary explorations on the leased lands and the extraction of oil therefrom, taking into consideration the subject matter of the lease, the character of the mineral products, the nature of the oil-bearing sand, whether dense or soft and porous, developments on contiguous lands, whether by the lessee or different operators, the cost of drilling, proximity to market, and facilities for marketing, current prices, whether high or low, location of lands, and such other conditions attendant on the operations as may explain the necessity for prompt, or excuse for delayed, action in prosecuting such development. But in such case the lessor assumes the burden of showing, and by clear and convincing proof must, to avail him, show by witnesses having experience, skill, and engaged in similar operations that the lessee, having due regard for the advantage and profit of himself and the lessor, has not, surrounding circumstances and conditions considered, exercised ordinary diligence in conducting such operations.

Grass *v.* Big Creek Development Co. (West Virginia), 84 Southeastern, 750, p. 753, March, 1915.

FAILURE TO DEVELOP—FORFEITURE—ESTOPPEL.

A lessor of oil lands for the purpose of having the same developed by the lessee may, by permitting the lessee to expend large sums of money in drilling a well, waive his right to declare a forfeiture because of the failure of the lessee to develop the land within the time specified in the lease.

Owens *v.* Corsicana Petroleum Co. (Texas Appeals), 169 Southwestern, 192, p. 195, June, 1914.

TERMINATION ON FAILURE TO DRILL WELL OF AMOUNT.

Where parties by an oil lease and contract fix and agree upon a limit of time within which the oil company may explore for oil, and stipulate that by which the bringing in of a well of stated daily production gives the right to continue upon the land for an indefinite time, the parties must be bound by the terms of their contract, and the courts are not at liberty to extend or enlarge or vary the terms because of misfortune or accident of the oil company not provided for in the contract, which, without any fault on the part of the lessor, prevented the lessee, the oil company, from successfully bringing in a well of the stipulated daily production; and under such a contract when the time limit expires, and the oil company has failed to produce oil in the quantities stipulated, the lessor has the right to declare the lease at an end.

McLean *v.* Kishi (Texas Appeals), 173 Southwestern, 502, p. 503, January, 1915.

ABANDONMENT.

The failure of the lessee of an oil and gas lease to drill more than one well upon the premises in a period of 16 years, together with the declared intention of the lessee that the quantity of oil in the premises and the cost of drilling another well would not justify further development, shows conclusively an abandonment of the premises, except sufficient of the surface to operate the one well.

Highfield Co. *v.* Kirk (Pennsylvania), 93 Atlantic, 815, p. 816, January, 1915.

FORFEITURE AND CANCELLATION—EQUITY WILL NOT AID IN FORFEITURE.

A lessor of lands for oil can not invoke the aid of a court of equity to declare and enforce a forfeiture of the lease for a failure on the part of the lessee to comply with its terms and to produce oil in paying quantities, in the absence of an allegation or evidence of a fraudulent refusal to comply with the terms of the lease, or to respond to repeated and urgent demands for additional expenditures of money in continuous development, where the lessee has paid

or tendered the lessor his share of the proceeds arising from the productions of oil and gas resulting from the lessee's activity in producing the same, and where no oil has been wasted and where it appears that the lessee has drilled four wells at considerable cost, from three of which there has been no adequate return from his investment and there will be none from two wells, and where the leased lands were located in a new, untried, and undeveloped oil and gas territory, many miles from a readily available market for the products, and where by an enforced forfeiture gross injustice would result to the lessee.

Horse Creek Coal Land Co. *v.* Trees (West Virginia), 84 Southeastern, 376, p. 377, February, 1915.

TERMINATION.

When it is provided in an oil lease that it is terminable at the will of one of the parties it then becomes terminable at the will of either of the parties.

Owens *v.* Corsicana Petroleum Co. (Texas Appeals), 169 Southwestern, 192, p. 197, June, 1914.

MINING PROPERTIES.

TAXATION.

LEGISLATIVE DESIGNATION OF PROPERTY.

The legislature of a State must determine the questions of State necessity, discretion, or policy involved in ordering taxation, and decides when, how, and for what public purposes taxes shall be levied and collected, and selects the subjects of such taxation; and the statute for the levying of taxes should specifically or otherwise enumerate the kinds of property to be taxed, and the rule as applied to the taxation of oil and gas leases and oil-mining property.

Indian Territory Illuminating Oil Co., In re (Oklahoma), 142 Pacific, 997, p. 999.

INTERESTS IN REAL PROPERTY NOT SEVERED FOR TAXATION.

The Legislature of Oklahoma has not selected oil and gas leases, as such, as subjects of taxation, nor has it provided for the severance of the various interests which may be held in real property for purposes of taxation.

Indian Territory Illuminating Oil Co., In re (Oklahoma), 142 Pacific, 997, p. 999.

LIABILITY OF LESSOR OR LESSEE FOR TAXES.

Where the statute does not provide for the severance, for the purposes of taxation, and an oil and gas lease is silent upon the subject, the obligation to pay taxes upon the leased premises devolves upon

the lessor; but the lessee's assumption of the payment of taxes and assessments does not relieve the lessor from his liability nor does it enable the taxing authorities to secure a personal judgment against the lessee.

Indian Territory Illuminating Oil Co., In re (Oklahoma), 142 Pacific, 997, p. 1001.

LEASEHOLD NOT "REAL PROPERTY" WITHIN TAXING LAWS.

Under sections 7304 and 7307, Revised Laws of Oklahoma (1910), real property, which for the purpose of taxation means land and buildings, structures, and improvements thereon, and all rights and privileges thereto belonging, as well as all mines, minerals, quarries, and trees on or under the same, must be listed and assessed in the name of the owner of the land. A leasehold under an oil and gas lease, being a chattel real, is personal property, and does not fall within the designation of "real property."

Indian Territory Illuminating Oil Co., In re (Oklahoma), 142 Pacific, 997, p. 999.

OIL AND GAS LANDS AND LEASES.

Oil and gas, while lying in the strata or earth from which they are produced, constitute a sort of subterranean faera natura which, if taxed at all, must be taxed as real property to the owner of the land under which, for the time being, they may lie, and can not be taxed against the owner who has a mere lease or license to go upon the premises, search for, and if found, take them away; and this is the most scientific method for imposing taxation upon this class of property, as to undertake to tax an oil and gas lease is to undertake to impose a tax upon the illimitable vista of hope. Many instances are known where lessees have paid thousands of dollars bonus for a lease and have discovered no oil, and other instances are known where leases have cost comparatively nothing and oil has been found in enormous quantities. Whether oil is under any particular tract of land is beyond the ken of man until a well has been drilled, and even then no one can foresee how long a well will last or what its production will be. Under the system of taxation devised by the Legislature of Oklahoma, the wealth produced by the oil industry, the production of oil, the capital invested in its production, the oil on hand, and the oil in place, are taxed, and there is no justification in the law for any additional exactions.

Indian Territory Illuminating Oil Co., In re (Oklahoma), 142 Pacific, 997, p. 1001.

MINING CLAIMS SUBJECT TO TAXATION.

The Montana statute for the taxation of mining property is not an exemption provision, but a revenue measure apportioning to the owners of mining claims what the legislature deemed to be their just

proportion of the public burden, and before the additional burden can be imposed, the taxing authorities must ascertain that the conditions authorizing its imposition in fact exist.

Barnard Realty Co. *v.* City of Butte (Montana), 145 Pacific, 946, p. 948, January, 1915.

MINING CLAIM WITHIN CITY LIMITS.

The fact that mining property is located within the limits of a city and has been platted for the purpose of putting the lots upon the market for sale and selling them as there was demand and was thereby given an independent value for town-site purposes, as other lands within the city limits, is not sufficient to make it subject to special taxation under the constitution of Montana in the absence of proof of an intent on the part of the owner to use it for a purpose other than mining.

Barnard Realty Co. *v.* City of Butte (Montana), 145 Pacific, 946, p. 948, January, 1915.

INDEPENDENT USE OF MINING CLAIM.

The constitution of Montana, providing that mines, after purchase from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground is used for other mining purposes and has a separate and independent value, in which case it shall be taxed at its value for such other purposes, intended to bring into the class of taxable property mines and mining claims and to provide a method by which the owners of them might be compelled to bear their equitable portion of the expenses of the government. So long as a mining claim is used and held exclusively for mining purposes, the owner is not required to bear any other burden. When the property has, by reason of its location, acquired a value for some independent use and is devoted by the owner to such use, it then becomes at once subject to taxation at that value, to be ascertained by the assessing officer. By devoting it to this new use the owner thereby creates an estate which, in the eye of the law, is regarded as independent of the original estate and is subject to taxation.

Barnard Realty Co. *v.* City of Butte (Montana), 145 Pacific, 946, p. 947, January, 1915.

COAL MINED FROM INDIAN LANDS—PRIVILEGE TAX.

The statute of Oklahoma providing for the levying and collection of a gross revenue tax from persons and corporations engaged in mining and requiring such persons to file with the State auditor a statement showing the amount and kind of mineral mined and requiring the payment thereon of a gross revenue tax, does not authorize the State of Oklahoma to levy such gross revenue tax on coal mined from the lands of the Choctaw and Chickasaw Indians by

a lessee of such lands, as the agreement with the Indians imposes upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and the agency selected by the United States for that purpose can not be subjected to an occupation or privilege tax by the State of Oklahoma.

Choctaw & Gulf Railroad Co. *v.* Harrison, 235 U. S., 292, p. 298.

COAL MINED FROM INDIAN LANDS—GROSS REVENUE TAX.

The agreement between the United States and the Choctaw and Chickasaw Indians, ratified and confirmed by Congress June 28, 1898 (30 Stat., 495, p. 510), providing that their coal should remain common property of the members of the tribe and that revenue derived therefrom should be used in the education of the Indian children, and that the mines thereon should be under the supervision and control of two trustees appointed by the President, and that all such mines should be operated and royalties of 15 cents per ton paid into the Treasury of the United States, giving the Secretary of the Interior power to select agencies for carrying out the agreement and authorizes a lease to a railroad company of the Indian coal lands, and coal mined from mines belonging to such Indians is not subject to a gross revenue tax.

Choctaw & Gulf Railroad Co. *v.* Harrison, 235 U. S., 292, p. 296.

TAXATION OF OIL IN TRANSIT.

The statute of Tennessee providing that persons having oil depots, storage tanks, or warehouses, for the purpose of selling, delivering, or distributing oil, and using a railroad car or railroad depots for such purpose, shall pay a privilege tax on such oil, does not authorize the imposition of such privilege tax on an oil company shipping a tank car of oil from its refinery in one State and a carload of barrels from another State to itself in a third and different State for the purpose of filling orders taken by its salesmen, and where the barrels were filled from such tank car without storage of the oil in a depot or warehouse where in some instances a few barrels of oil were temporarily left for customers at the side of the railroad track.

Western Oil Refining Co. *v.* Dalton (Tennessee), 174 Southwestern, 1138, p. 1139, April, 1915.

ROYALTIES NOT INCOME.

A mining lease granting to the lessee the absolute and exclusive right to take out and have all the ore in the land and to remove it at any time within 25 to 50 years, a time sufficient to enable him to remove all the ore, being equivalent to an unlimited time, the lessee agreeing to pay yearly fixed amounts per ton for all the ore taken, and to pay a stipulated minimum amount annually whether ore was

mined or not, is in effect a grant of a part of the corpus of the property, and the lessees become the owners of the ore and the lessors the owners of the claims and of the right to collect the amounts the lessees covenanted to pay for the ores and the transactions are in effect sales of the ore for covenants to pay the purchase price thereof and such a lease is in reality a sale of the ore and the royalties reserved are in fact the purchase price of the ore; and the amounts paid under the name of royalties for the ore taken can not be called or classed as income, but must be regarded as parts of the capital of the corporation, as the lease merely changed the form of the property of the lessor from the ores to the royalties and claims to the purchase price of such ore, which the lessee covenanted to and did pay under the name of royalties, and such sums are not subject to the United States corporation tax act (36 Stat., 111).

Von Baumbach *v.* Sargent Land Co., 219 Fed., 31, p. 37.

STATE BOARD'S POWER TO REASSESS.

The Legislature of Oklahoma may provide for a reassessment of property of public-service corporations which has been assessed at less than its fair value, but in the absence of any such provision the State board of equalization has no power to do so; and where the State board has assessed property of all public-service corporations and has equalized the various county assessments and computed the amount of the State levy and caused the same to be certified to the several county clerks, it is then without jurisdiction or authority to reconvene and reassess such property, and prohibition will lie and is the proper remedy to restrain the State board from so doing.

Prairie Oil & Gas Co. *v.* Cruce (Oklahoma), 147 Pacific, 152, March, 1915.

TRESPASS.

PROPERTY DESTROYED BY BURNING OIL.

An oil-operating company that stored its oil in tanks and thereafter negligently allowed live crude petroleum oil to escape from its tanks and premises, flow down through a ditch and to, against, and around a dredge, the property of another, well knowing that such oil was liable to be ignited and damage or destroy such property, and negligently failed to warn the owner of the property or his servants in charge of the dredge that the oil from the tanks had escaped, and that it was live and inflammable oil, different from dead oil that had previously flowed down and around such dredge, and where the oil was accidentally ignited by fire from the dredge and the dredge was destroyed, is liable for damages for the loss of the dredge by fire, though the oil was accidentally ignited by fire from the dredge, as the negligent act of the corporation in permitting the oil to escape and

flow down off of its premises around the dredge, must be regarded as the proximate cause; and the accidental firing of the oil is not an independent agency that could not reasonably have been anticipated, but it was an occurrence that should have been reasonably expected in the course of events and according to common experience in handling such oil and therefore it did not break the chain of causation extending from the original wrongful act and negligence of the oil operator.

Rock Oil Co. *v.* Brumbaugh (Indiana Appeals), 108 Northeastern, 260, p. 263, March, 1915.
See Commercial Union Assurance Co. *v.* Gulf Refining Co. (Texas Civil Appeals), 174 Southwestern, 874, March, 1915.

CONVERSION—MEASURE OF DAMAGES.

In an action for trespass upon metalliferous veins, where the trespasser has mined, milled, and sold the finished or enhanced product, the conversion takes place when he applies the proceeds to his own use, and the measure of damages is the enhanced value or gross proceeds realized from the ore without deductions of any value the trespasser may have bestowed upon the ore by his labor.

Liberty Bell Gold Mining Co. *v.* Moorhead Mining & Milling Co. (Colorado), 145 Pacific, 686, p. 688, January, 1914.

INNOCENT TRESPASS—MEASURE OF DAMAGES.

In an action for damages for an innocent trespass by mining and milling metalliferous ores, where the trespasser sold the finished product and applied the proceeds to his own use, the owner should recover for his actual loss as his damages are compensatory only; and in such case the measure of damages is the gross value of the ore in place before it was disturbed, and such damages may be ascertained by deducting from the enhanced value or gross proceeds the cost of making the product at the time of conversion.

Liberty Bell Gold Mining Co. *v.* Moorhead Mining & Milling Co. (Colorado), 145 Pacific, 686, p. 688, January, 1915.

PROPERTY HELD IN TRUST.

LEVY AND SALE ON EXECUTION.

Mining property is subject to levy and sale on execution on judgment against a mining company, though the property had been conveyed by a deed of trust by the mining company to trustees named, but the trust created by the deed was not defined, no powers of the trustees were enumerated, and no beneficiary was named, and the conditions imposed upon the mining company had never been performed.

Ohio & Colorado Smelting & Refining Co. *v.* Barr (Colorado), 144 Pacific, 552, p. 553, December, 1914.

MONEY RECEIVED FOR STOLEN ORE BY MINER.

A miner employed by a gold-mining company as a foreman and placed in charge of its sluice boxes, gold dust, and nuggets bears a trust relation to the mining company with respect to the property in his charge and with respect to the gold dust and nuggets in the flumes and sluice boxes within his charge, and the mining company may impress a trust upon the money in the possession of a bank or in the custody of the officer of a court, received by such miner for gold dust and nuggets secreted, appropriated, and stolen by him while acting as such foreman for the mining company and subsequently sold by him and for which he received the money on which the trust was sought to be impressed.

Pioneer Mining Co. *v.* Tyberg, 215 Fed., 501, p. 502.

CONTRACTS OF SALE.

DAMAGES FOR BREACH OF CONTRACT FOR SALE OF COAL.

The breach of a contract by which a coal-mining company agreed to sell and deliver to the purchaser certain stated carloads of coal each day for a certain length of time to be delivered at a stated place gives the purchaser the right to go into the market and purchase other coal to supply the place of that which he failed to receive under the contract, and the measure of damages to which he is entitled in an action for the breach is the difference between the contract price and the market price of coal of similar kind and character at the time and place of delivery, and he would not be entitled to recover anything for the profits he might have made by a resale, because, having purchased coal of a similar kind and character to substitute for that which he failed to receive under the contract, he acquires the profits, upon a resale of the coal bought by him and substituted for the coal which he failed to receive under his contract. But if he made a reasonable and diligent effort to obtain other coal of similar kind and character to supply the place of that he failed to receive under his contract, the damages to which he would then be entitled would be the profits which he could have realized from a resale of the coal. On the other hand, if, on the breach of the contract by the seller, the purchaser made no effort to buy other coal of similar kind and character to supply the place of that he failed to receive under his contract, then the purchaser could recover no damages either for profits or otherwise for the seller's failure to deliver the coal according to the contract.

Log Mountain Coal Co. *v.* White Oak Coal Co. (Kentucky), 174 Southwestern, 721, March, 1915.

CONDITIONAL SALE OF MINING MACHINERY—PRIORITY OF LIENS.

The vendor of mining machinery sold on condition that the title thereto should remain in him until the purchase price was fully paid, has a right and title thereto superior to the lien of a lessor, where the mining machinery was placed in and upon a leased mine for the purpose of its operation, but not intimately embodied in other property of the lessee, though the original contract of sale was not recorded.

Jeffrey Manufacturing Co. *v.* Mound Coal Co., 215 Fed., 222, p. 225.

BINDING EFFECT OF CONTRACT OF PURCHASE—RIGHTS TO SECRET PROFITS.

Persons joining in a contract for the purchase of certain mines and mining properties by which they contracted for designated portions of an equity particularly described in the contract can not be relieved from liability, nor recover a portion of secret profits alleged to have been realized by another joint contractor in connection with the sale of the mines and the mining property to a corporation, where the complaining parties received the precise thing for which they contracted and where the alleged agreement by which the party complained of received the alleged secret profits, neither decreased nor increased the value of the equity described in the original contract, and did not in any manner affect the interest of the complaining parties, and where no fraud or misrepresentation of the value of the property was relied upon.

Ringolsky *v.* Maud L. Mining Co. (Missouri), 171 Southwestern, 56, p. 60, December, 1914.

STATUTORY LIENS.

COAL MINE—NATURE OF DEVELOPMENT WORK.

Labor performed in mining coal in the regular course of operating a mine is not performed in the making of any improvement within the meaning of the statute of Colorado providing for mechanics' liens on mines, and such labor can not be made the basis of a mechanic's or miner's lien.

Expire Coal Co. *v.* Rosa (Colorado), 142 Pacific, 192, p. 193.

VERIFICATION OF STATEMENT FOR LIEN.

The statute of Oregon requires that the statement for a miner's lien shall be verified by the oath of the claimant, or some other person having knowledge of the fact, and it is sufficient for an agent to state in the verification that he has personal knowledge of all the facts set forth in the lien and knows the facts therein set forth to be true, and that the statement is true and correct and that the sums therein named are due the claimant as therein stated.

Loud *v.* Gold Ray Realty Co. (Oregon), 142 Pacific, 785, p. 787.

LESSEE NOT A CONTRACTOR.

A lease of a coal mine in the usual form for the demise of real estate containing provisions for mining and selling coal and paying rent in the nature of royalty is not a contract, nor does it create such a relation between the lessor and lessee that the latter becomes a contractor within the meaning of the mechanics' lien law of Colorado, as under this law a mechanic's lien will not attach to the interests of the owner of a mine for labor done in working or developing the mine where the work is done at the instance of or under contract with one whose only interest is that of a lessee.

Empire Coal Co. *v.* Rosa (Colorado), 142 Pacific, 192, p. 193.

MINER'S RIGHT TO ASSIGN LIEN.

After the lien of a miner has been perfected by the filing and recording of a proper claim of lien, it may be assigned; but under the laws of Oregon, if a miner has a right to perfect a lien and he assigns his debt or claim to another, his assignee takes title to the debt but has no right to perfect the lien.

Loud *v.* Gold Ray Realty Co. (Oregon), 142 Pacific, 785, p. 786.

MINERS WORKING FOR LESSEE—LIENS.

Section 4025 of the Revised Statutes of 1908 (Colorado) makes every contractor, architect, engineer, subcontractor, builder, agent, or other person having charge of the construction, alteration, or repair, either in whole or in part, of any building or other improvement upon or in connection with a mine or its operation, the agent of the owner of the mine for the purposes of mechanics' liens, but this does not apply or include a lessee under an ordinary lease for operating the mine and does not authorize mechanics' liens by miners employed and working for a lessee in the development and operation of a mine under a lease.

Empire Coal Co. *v.* Rosa (Colorado), 142 Pacific, 192, p. 193.

RIGHT OF MINER TO LIEN ON LEASED PROPERTY.

The statute of Colorado provides that mechanics, materialmen, contractors, and all persons of every class performing labor upon or furnishing materials to be used in the construction, alteration, or repair of any building, tunnel, or other improvement upon land shall have a lien upon the property for the value of such services rendered or labor done, whether at the instance of the owner or of any other person acting by his authority or under him as agent, contractor, or otherwise; but this statute does not give a lien to persons employed by a lessee operating a mine under a lease at a stipulated rent in the

nature of royalty, and where the work for which the lien was claimed was done in the ordinary development work under the lease in order to extract the ore.

Grimm *v.* Yates (Colorado), 145 Pacific, 696, p. 697, January, 1915.

NOTICE BY LESSOR NOT REQUIRED TO PROTECT TITLE.

The owner of a mine who leases it to be operated under the terms of the lease by the lessee, where none of the work performed by the lessee was authorized by the lease itself but only contemplated as a part of the operation of the mine, is not required to give the notice provided for in the statute of Colorado in order to protect his title and the property in the mine from mechanics' and miners' liens authorized by the statute.

Grimm *v.* Yates (Colorado), 145 Pacific, 696, p. 698, January, 1915.

MINERS EMPLOYED BY LESSEE—FAILURE OF OWNER TO GIVE NOTICE.

Miners performing services and persons furnishing supplies for the mine at the request of the lessee have a right to perfect and hold liens upon a mine for such labor or supplies unless the owner of the mine has posted at not less than three conspicuous places upon the mine, at or near the place where the same was worked, a signed written notice, stating the name of the lessee or contractor, and that the owner will not be responsible for any debts contracted by the lessee or contractor in connection with the operation of the mine.

Loud *v.* Gold Ray Realty Co. (Oregon), 142 Pacific, 785, p. 787.

ENFORCING LIENS—FAILURE TO GIVE NOTICE—PLEADING.

Section 1149, Remington and Ballinger Code of the State of Washington, gives every person performing labor for a person or corporation in the operation of any mining or manufacturing company a lien on the real and personal property of such person or corporation in the operation of its business, and in an action to foreclose a lien on mining machinery the mine operator can not after judgment and on appeal raise the objection or take advantage of the failure of the lienor to serve the statutory copy of notice of lien upon him, as such a question must be raised in the trial court, and defects in pleadings that might have been cured by amendment will not be considered after verdict.

Cook *v.* Snyder (Washington), 146 Pacific, 156, p. 157, February, 1915.

OPTION AGREEMENT TO PURCHASE MINE—RIGHT OF MINERS TO LIEN.

Section 2904 of the Revised Statutes of Arizona, 1901, provides that all miners who may labor upon any mine or mining claim shall have a lien upon the same for any amount due them; and the amend-

ment to this section, as incorporated in section 3654 of the Civil Code of 1913, provides that miners who labor in or upon any mine or mining claim shall have a lien for the sum due and that such lien shall attach to the mine or mining claim under either of the following conditions: (1) By virtue of a contract between the miner and the owner of the mining claim or his agent; (2) by virtue of a contract between the miner and the lessee of any such mine or his agent where by the terms of the lease the lessor permits the lessee to develop or work the mine; and (3) where by virtue of a contract between the miner and any person or corporation having an option to buy or contract to purchase the mine, where such option contract permits the purchaser to work or develop the same; but these statutes do not authorize a miner performing labor upon a mine for a purchaser under an option agreement to purchase the same, to enforce his lien against the mining property, though such option contract to purchase the mine permitted him to enter on and develop the property, where such option contract was given before the amended act was passed, as such option contract does not make the purchaser an agent of the owner.

Foltz *v.* Noon (Arizona), 146 Pacific, 510, February, 1915.
Oceanic Gold Mining Co. *v.* Steinfeld (Arizona), 147 Pacific, 717, April, 1915.

ENFORCING LIEN AGAINST PROPERTY OF LESSORS.

Miners employed by the lessee of a mine who operates the same and who holds the optional agreement to purchase the machinery and equipment which, with the mine, was leased for its operation, may enforce their lien against the leasehold interest of the lessee and against the machinery so held by the lessee under his option to purchase, though he never exercised such option and never became the absolute owner of the machinery and personal property, where the lessor failed to have such option agreement recorded within 10 days after the change of the possession of the property as required by the statute of Washington, as in such case the sale must be treated as absolute as to the liens of the miners, who were subsequent creditors in good faith.

Cook *v.* Snyder (Washington), 146 Pacific, 156, p. 157, February, 1915.

RETROACTIVE EFFECT OF STATUTE—LESSEE NOT AGENT OF LESSOR.

The right of a miner to a lien upon a mine or mining claim for labor done or material furnished under the statute of Arizona must be tested by the statute existing at the time the labor was performed or the materials furnished; and if the labor was performed or the materials furnished before the amended act of December, 1912, then the right to the lien must be found as the statute existed before that

date, as the amendatory act can not have a retroactive operation, as such an application of the amendatory act would be a substantial interference with the obligation of the contract itself; and prior to the amendatory act the mere fact of the existence of the contract to purchase or an option to buy a mining claim, by the terms of which the purchaser was permitted to enter upon, work and develop the mine, with no additional powers over the property, would not constitute the proposed purchaser the agent of the owner, and would not make the mine or mining property subject to the lien of miners who were employed by the person holding the contract or option to purchase.

Foltz *v.* Noon (Arizona), 146 Pacific, 510, February, 1915.
Oceanic Gold Mining Co. *v.* Steinfeld (Arizona), 147 Pacific, 717, p. 718, April, 1915.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

DOUBLE DAMAGES NOT AUTHORIZED.

In an action by a miner for damages for injuries caused by the negligence of a mine operator, a miner is not entitled to recover for the loss of time occasioned by the injury and for impairment of his power to earn money during the same period of time, as this would be authorizing a recovery of double damages.

Main Jellico Mountain Coal Co. *v.* Young (Kentucky), 169 Southwestern, 841, p. 842, October, 1914.

ALLEGATIONS AS TO LOSS OF TIME.

In an action by a miner for injuries caused by a fall of slate from the roof where the petition alleged that the slate cut off the plaintiff's thumb, injured his shoulder, caused him great pain and physical suffering, and partially destroyed his power to earn money, and that the injuries are permanent in character, a recovery for time lost by the injured miner is not justified, in the absence of any claim or plea therefor in his petition.

Main Jellico Mountain Coal Co. *v.* Young (Kentucky), 169 Southwestern, 841, p. 842, October, 1914.

WRONGFUL DEATH OF CHILD—AGGRAVATING CIRCUMSTANCES.

In an action by a parent for the wrongful death of a minor son caused by the alleged negligence of a smelting and refining company an instruction is erroneous which ignores and makes no mention of the circumstances, whether aggravating or mitigating, under which the killing took place, and leaves to the jury as a simple question of dollars and cents to say by what amount the parent has suffered actual pecuniary loss in the death of a child, as such a construction makes the provision of the statute wholly meaningless and inoperative

which provides that damages shall be assessed "having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default;" and under this provision the jury are not restricted to such damages as are the necessary and inevitable result of the injuries sustained, and are free also to consider, in making up their verdict, the circumstances attendant on the wrongful act, neglect, or default, which gave rise to the injury complained of.

Dalton *v.* St. Louis Smelting & Refining Co. (Missouri Appeals), 174 Southwestern, 468, p. 471, March, 1915.

DEATH OF HUSBAND—MEASURE OF RECOVERY.

In an action by a widow for damages for the wrongful death of her deceased husband, it is proper for a court to instruct the jury to the effect that the measure of damages is the detriment which the widow proximately sustained by reason of the death of the husband, and in assessing the damages it is the duty of the jury to consider the age of the deceased, the number of years he might have reasonably and probably been expected to perform manual labor, his contribution to and support of the plaintiff and his infant children, and all the circumstances and conditions surrounding their relations, and the likelihood and probability of the deceased to contribute to the maintenance and support of the plaintiff, and to fix compensation for the injuries shown to have been inflicted on the plaintiff by reason of the death of the deceased; and such a construction is not open to the charge of error in failing to limit the plaintiff's recovery and pecuniary damages.

Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30, p. 33.
Great Western Coal & Coke Co. *v.* McMahan (Oklahoma), 143 Pacific, 23.
Great Western Coal & Coke Co. *v.* Cunningham (Oklahoma), 143 Pacific, 26.

DAMAGES NOT EXCESSIVE.

INSTANCES.

A judgment for $3,000 for injuries that are not only serious in their nature, but of a permanent character, and will follow the miner through life, seriously impairing his capacity to perform the physical labor upon which he must depend for his support, and where at the time of receiving the injuries he was but 29 years of age, is not excessive.

Darby Coal Mining Co. *v.* Shoop (Virginia), 83 Southeastern, 412, p. 416, November, 1914.

A judgment for $7,500 for the death of a miner who was 28 years of age, in good health and performing manual labor regularly, with an earning capacity of $125 per month, leaving a wife and two children; and where it appeared that during the four years of his married life he had accumulated about $500.

Great Western Coal & Coke Co. *v.* Coffman (Oklahoma), 143 Pacific, 30, p. 34.

A verdict for $15,000 for the death of a miner 43 years old leaving a widow and six children and earning as high as $10 a day, and where he was shown to be sound of body and mind, was able to work all the time, and all his earnings went to the support of his family.

San Bois Coal Co. *v.* Resetz (Oklahoma), 143 Pacific, 46, p. 50.

A verdict of $7,334 for an injury to a coal miner can not be said as a matter of law to be excessive where it appears that a piece of slate some 5 feet in length, 2½ feet in width, and 6 to 8 inches thick in the center, fell upon the miner's back and crushed him to the ground, and where the evidence showed that the spinous processes of the backbone were broken down; that the muscles of the back on either side of the backbone had become rigid and hardened; that the lower limbs of the miner had become benumbed; and where the weight of the miner had been reduced from 150 pounds to 124 pounds, and he suffered from the disarrangement of the proper action of his kidneys and bowels, and where it appeared that at the time of the injury he was a stout man, able to earn $4 or $5 a day, and since the injury has been entirely incapacitated from doing any kind of physical labor.

New Bell Jellico Coal Co. *v.* Sowders (Kentucky), 172 Southwestern, 914, p. 917, January, 1915.

A verdict and judgment for $9,000 in favor of an able-bodied boy 18 years of age, can not be held as a matter of law to be excessive where the boy's foot was mashed by being run over by a car, the bone of the leg broken, the flesh lacerated and torn from it, and where 27 pieces of the bone protruded and were removed, and where the surgeon described the injury as a compound fracture with extensive lacerations of the tissues upon the ankle and knee, and that the bone was broken and exposed and the ankle joint stiff and one leg rendered shorter than the other, and where, before the wound healed, parts of the bone disintegrated and the patient suffered excruciating pain.

Dillon *v.* United States Coal & Coke Co. (West Virginia), 84 Southeastern, 956, p. 960, April, 1915.

QUARRY OPERATIONS.

STORING EXPLOSIVES—NUISANCE.

A person is guilty under the law of maintaining a nuisance who keeps stored indefinitely in a thickly settled neighborhood large amounts of high explosives which are liable, as dynamite is liable, to explode and do serious injury to surrounding persons and property, though the manner of keeping such explosives is characterized by no special negligence.

Sloss-Sheffield Steel & Iron Co. *v.* Prosch (Alabama), 67 Southern, 516, p. 519, December, 1914.

STORING EXPLOSIVES IN DANGEROUS PLACE.

A corporation engaged in operating iron-smelting furnaces and in quarrying rock, is liable for damages caused by an explosion and is guilty of maintaining a nuisance where it kept explosives stored in a wooden building or magazine situated near and in dangerous proximity to a thickly settled community and close to a railroad track owned and operated by the corporation and close to certain large slag piles, where hot slag was deposited by the corporation in the course of the operation of its furnaces and where hot slag was carried from its furnaces close by such explosives by engines hauling hot pots containing slag, as the place of storing the explosives was one where the explosion might reasonably be expected to occur; and such act of keeping and storing such explosives is sufficient to create a prima facie liability for injuries resulting from an explosion of such explosives.

Sloss-Sheffield Steel & Iron Co. *v.* Prosch (Alabama), 67 Southern, 516, p. 518, December, 1914.

USE OF EXPLOSIVES—DUTY AS TO USE.

The value of dynamite rests exclusively in its quality as a powerful explosive and if a quarry owner is under the necessity of using dynamite, or other dangerous explosives, the law casts the duty upon him to keep, handle, and use them in a reasonably safe and careful manner.

Sloss-Sheffield Steel & Iron Co. *v.* Prosch (Alabama), 67 Southern, 516, p. 518, December, 1914.

WORKMAN NOT REQUIRED TO INSPECT—RISKS NOT ASSUMED.

A workman engaged in a stone quarry, working under or near a bank of a gravelly nature upon which there was more or less stone, and which arose perpendicularly for about 10 feet and then continued for some 35 feet at an angle of about 45° is not required to examine the top of the bank above the place where he was at work; and while he was bound to exercise ordinary care to prevent injury, yet the responsibility for the condition of the sides and top of the bank, that which the workman could not see, was upon the quarry operator. A workman put to work in a place which subjects him to the danger of being injured by sliding rock or earth, does not assume the risk where the danger is not obvious to him, and where the master, with actual or constructive knowledge or notice of the danger, fails to warn him or to exercise due care in making the place safe.

Novy *v.* Breakwater Co. (Connecticut), 92 Atlantic, 668, p. 671, December, 1914.

OPERATOR'S KNOWLEDGE OF DANGER—DUTY TO INSPECT.

The owner and operator of a stone quarry using dynamite in loosening the stone under which employees were working, is charged with knowledge that parts of the ledge may at any time drop down on the workmen, and accordingly he should have the loose stone removed; and employees may assume that such duty had been performed by the employer. Under such circumstances the duty of inspection devolved upon the employer, and where the proper inspection would have disclosed the loose rock, the employer is liable for an injury to an employee caused by a fall of such loose rock.

Paul Stone Co. *v.* Saucedo (Texas Civil Appeals), 171 Southwestern, 1038, p. 1039, January, 1915.

PROVIDING SAFE PLACE—EMPLOYEE MAY ASSUME DUTY PERFORMED.

Under the rule that the operator of a quarry must exercise reasonable care to furnish the workmen in the quarry a reasonably safe place in which to work, the employees may, in the absence of knowledge or information to the contrary, assume that the operator had performed his duty in this respect.

Losasso *v.* Jones Brothers' Co. (Vermont), 93 Atlantic, 266, p. 270, February, 1915.

NEGLIGENCE OF VICE PRINCIPAL—LIABILITY OF OPERATOR.

The foreman in a quarry who has full charge of its operations and intrusted with the performance of the duties resting upon the owner or operator is a vice principal, and notice to him by a powder man immediately after a blast of the dangerous condition of a header is in law notice to the owner or operator, and the owner or operator is liable for the foreman's negligence in not remedying the defect so as to make reasonably safe the working place where employees are to proceed to work.

Losasso *v.* Jones Brothers' Co. (Vermont), 93 Atlantic, 266, p. 270, February, 1915.

DUTY OF EMPLOYER TO FURNISH MEDICAL AID TO INJURED EMPLOYEES.

The rule that whenever one person employs another to perform dangerous work, and while performing such work the employee is so badly injured as to incapacitate him for caring for himself, the duty of providing medical treatment is devolved upon the employer, based on the unexpressed humane and natural understanding existing between parties to the effect that whenever an employee is so injured that he can not care for himself, then the employer will furnish him medical or surgical treatment, must be applied in the case of the operation of a quarry where an employee in the quarry was so grievously hurt that he was in great danger of bleeding to death and could not assist himself or procure the necessary medical aid.

Hunicke *v.* Meramec Quarry Co. (Missouri), 172 Southwestern, 43, p. 54, December, 1914.

PUBLICATIONS ON METHODS OF MINING.

Limited editions of the following Bureau of Mines publications are temporarily available for free distribution. Requests for all publications can not be granted, and applicants should select only those publications that are of especial interest to them. All requests for publications should be addressed to the Director, Bureau of Mines, Washington, D. C.

BULLETIN 17. A primer on explosives for coal miners, by C. E. Munroe and Clarence Hall. 61 pp., 10 pls., 12 figs. Reprint of United States Geological Survey Bulletin 423.

BULLETIN 45. Sand available for filling mine workings in the northern anthracite coal basin of Pennsylavnia, by N. H. Darton. 1913. 33 pp., 8 pls., 5 figs.

BULLETIN 48. The selection of explosives used in engineering and mining operations, by Clarence Hall and S. P. Howell. 1913. 50 pp., 3 pls., 7 figs.

BULLETIN 53. Mining and treatment of feldspar and kaolin in the southern Appalachian region, by A. S. Watts. 1913. 170 pp., 16 pls., 12 figs.

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TECHNICAL PAPER 61. Metal-mine accidents in the United States during the calendar year 1912, compiled by A. H. Fay. 1913. 76 pp., 1 fig.

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